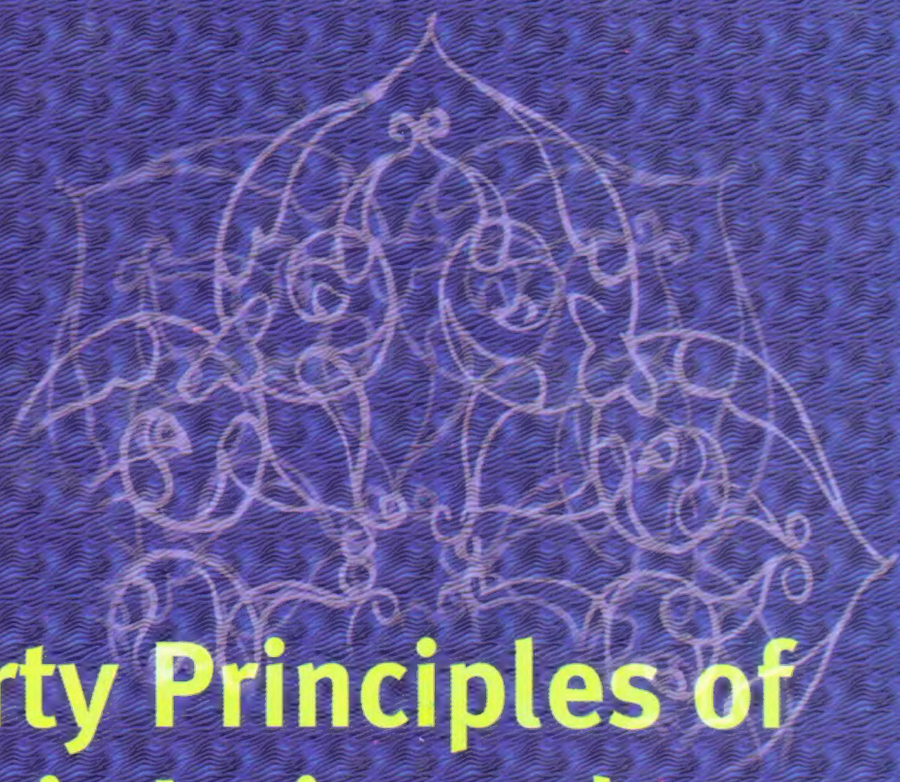
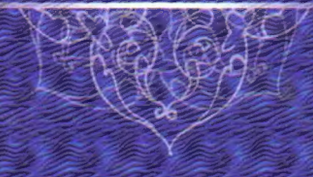


Thirty Principles of Islamic Jurisprudence

Ayatollah Sayyid Fadhel Hosseini Milani

Recorded and edited by Amar Hegedüs



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بسم الله الرحمن الرحيم

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Foreword

Dr. Sayyid Fadhel Hosseini Milani

Every branch of knowledge employs its own specific framework, methodology and processes to arrive at its objectives. In the early days of Islām, Muslims sought the Prophet's guidance to resolve matters they found problematic, and in some instances he ﷺ sought further Divine revelation to inform his response. When he was no longer with them, the Muslim community relied upon reports of his companions such as ʿAlī ﷺ, Ibn ʿAbbas or Abdullah ibn Masʿoūd on how he ﷺ had dealt with specific matters.

Later Muslim scholars were faced with a variety of contentious issues regarding hermeneutics, the interpretation of the Qur'ān — especially its equivocal terms — the reliability of those who reported *aḥadīth* and the interaction between the Qur'ān and the *ḥadīth*. This necessitated the setting-up of guiding principles by which to meet ever-increasing requests for answers.

Discussions regarding these principles and rules has resulted in the discipline now referred to as jurisprudence. The general principles evolved from such scholarly debate and investigation developed into the sole 'tools' by which questions regarding *sharīʿah* are universally answered.

In this reference text, intended for students of Islāmic Jurisprudence at MA level, I have tried to provide a concise exposition of the thirty major principles most frequently used in this field. I hope that it will be followed in the future by a further work of greater depth.

Dr. Sayyid Fadhel

فاضل الحسيني الميلاني

Hosseini Milani

Editor's note

Islāmic Jurisprudence plays a significant role in Muslim life, be it in regard to involvement in trade and business, family law or legal and illegal action. In short, Muslims search for clarification to ensure they fully meet their liabilities towards their Creator.

In the face of new and more complicated situations that are the result of scientific and technological advancement, the need for *sharīʿah* clarity becomes ever more pressing.

As in every field of knowledge, it is only highly educated specialists who are in a position to provide clarity. Only those specialists in Islāmic Jurisprudence who are capable of excercising *ijtihād* by way of their expertise and experience in utilizing its 'tools', are able to provide clarity regarding the matters mentioned above.

Sayyid Fadhel Milani, who for the last 35 years has researched, studied and applied the most common principles and tools used by *mujtahids* — one of the most complicated subjects of jurisprudence — is in the position of being able to access the reliable sources of *sharīʿah*.

Islam in English Press is privileged to present his extensive knowledge of this subject in the English language.

Amar Hegedüs

Conventions

ﷺ *Sallalahu Alayhi wa alihi wa Salaam*
May Allāh's greetings and blessings be upon him and his progeny (used immediately after referring to the Prophet Muḥammad)

عليها السلام *Alayha al-Salaam* – Peace be upon her
(used immediately after referring to Khadījah, Faṭimah, Zaynab and Maryam)

عليه السلام *Alayhi al-Salaam* – May Allāh bless him
(used immediately after referring to a single Imām or Prophet)

عليهما السلام *Alayhimi al-Salaam* – May Allāh bless them
(used immediately after referring to two Imāms or two Prophets)

عليهم السلام *Alayhum al-Salaam* – May Allāh bless them
(used immediately after referring to three or more Imāms or Prophets)

رحمه الله *Rahimahu Allāh* – May Allāh grant him mercy
(used immediately after referring to a single deceased and respected person)

رحمهم الله *Rahimahum Allāh* – May Allāh grant them mercy
(used immediately after referring to deceased and respected people)

قدس سره *Quddisa Sirroh* – May his soul be blessed
(used immediately after referring to a single deceased and respected scholar)

قدس سرهما *Quddisa Sirrohuma* – May their souls be blessed
(used immediately after referring to deceased and respected scholars)

رضي الله عنه *Radi Allahu anhu* – May Allāh be pleased with him
(used after referring to a respected companion of the Prophet ﷺ or the Imāms)

Ijtihād

Ijtihād is the deduction of rulings from their sources, mainly the Qur'ān and *aḥadīth*. This word, like the word *jihād*, is derived from the Arabic root *juhd*. *Ijtihād* is used to describe the striving or exertion required for any activity that entails a measure of hardship. While *juhd* is used to imply the carrying of a heavy load, *ijtihād* refers to intellectual exertion.

To be able to undertake *ijtihad*, a 'learned counsel' – *faqih* or *mujtahid* – needs experience and to be well versed in the statements of both the Prophet ﷺ and error-free Imāms ﷺ, in addition to being well acquainted with the Holy Qur'ān. Legal opinions that result from the process of *ijtihad* are referred to as *fatāwā*.

Imām Ṣādiq ﷺ is recorded to have said, 'To provide legal opinions on points of Islāmic law, the *mujtahid* needs to have:

1. Comprehensive understanding of the Qur'ān.
2. Comprehensive understanding of the *aḥadīth*.
3. Cognition of the inward meaning of matters directly or indirectly implied.
4. Comprehensive understanding of etiquette and good manners.
5. Comprehensive understanding of consensuses and disagreements in Islāmic Law, as well as the arguments upon which these are based.

6. The ability to supply and justify their independent opinions and conclusions.
7. The public's acknowledgement of their being righteous people.

Miṣbāḥ al-Sharī'ah Chapter 63, p.355

Like the oceans, Islāmic law does not yield its treasure easily. Not infrequently, the inexperienced, ill-prepared and ill-equipped are drowned in their attempts to fathom its depths. As considerable expertise and knowledge are needed to undertake *ijtihād* in the cultural, economic, legal, political and socio-ethical spheres, those *mujtahids* whom others acknowledge are best equipped to undertake *ijtihād* receive the greatest following.

Principles of Jurisprudence

Ijtihād is based on Principles of Islāmic Law — *Uṣūl al-Fiqh*. Attendees of theological colleges — *ḥawzah* — concentrate on the study of three major textbooks — and those who attain the highest levels of *Al-Baḥth al-Khārij* often memorize them. These textbooks are:

1. *Farā'id al-Uṣūl* by Shaykh Murtaḍa al-Anṣāri, d.1281 AH
2. *Kifayat al-Uṣūl* by Muḥammad Kaẓim al-Khorāsani, d. 1329 AH, and
3. *Durūs fī 'ilm al-Uṣūl* by Muḥammad Bāqir al Ṣadr, martyred 1380 AH

After five years of in-depth study of these treatises, the most able students are invited to enrol in *Al-Baḥth al-Khārij* courses. Even though this requires a further eight to twelve years' study, it is only via this lengthy process that the most intelligent and intellectually able students can acquire the experience needed to enable them to undertake *ijtihād* in the future.

The significance of ḥadith

> According to the *Thaqalain ḥadith*, two precious and significant elements safeguard the Muslim nation from being led astray. These elements of guidance and prosperity are the Qur'ān and the guidance of the error-free Imāms ﷺ. Imām Ṣādiq ﷺ said, 'It is our duty to teach you the principles and it is your duty to explain the ramifications of legal rulings.'
>
> **Biḥar al-Anwār Vol. 2, p.245**

He refers here to the need for a consistent examination of possible ramifications that may result from the application of the trustworthy principles established by the Imāms ﷺ. Based on the above, scholars need to investigate all *aḥadīth* for the following:

1. Firstly, the authenticity of all narrations needs to be verified to ensure that no omission or addition has been made to the original text, and secondly, the reliability of the narrators must be ascertained.

   Allamah Māmeqanī discusses the lives and reputations of *ḥadīth* narrators and the opinions of those who have criticized them in his book *Tanqih Al-Maqāl fi ʿIlm al-Rijāl (Verification)*. While this provides one yardstick by which to discriminate and determine which narrators are considered reliable, Ayatollah al-Khoei ﷺ later produced a 24-volume work on this subject entitled *Muʿjam Rijāl al Ḥadīth* (*Encyclopaedia of Ḥadīth Narrators*).

   Even though it takes many hours to confirm the reliability of each narrator of a particular *ḥadīth*, no *mujtahid* is able to certify it as being genuine and accurate without first having undertaken that process.

2. Because some *aḥadīth* are more didactic than others, *mujtahids* need to differentiate between the text of a *ḥadīth* and its context, to discern its literal and metaphorical meanings, and to understand which parts of the text are general and which are specific; which are conditional and which unconditional. Without the ability to do this they cannot arrive at secure, sound conclusions. For example, the Prophet's advice to men not to wear robes that trail on the ground is a reference to the common Arab understanding that to do this is symptomatic of arrogance, pride and the flaunting of wealth. However, those who only understood what was said in a literal sense took it to mean that the length of robes should never be longer than a full hand's-width above the ankle.

3. As the Holy Qur'ān is a book of guidance that explains everything (Qur'ān 16:89), the *mujtahid* needs to be able to find an explanation — for every subject raised in the Qur'ān — in the other *āyat* of the Qur'ān. Clearly, in the absence of a comprehensive knowledge of the Qur'ān, this is not a possibility and to rely solely on one's own interpretation of any particular *āyah* is considered to be an act of gross ignorance.

Comprehensive study

Contrary to what many think, the great Imāmiyah *mujtahids* examined the works of all the other schools of Islāmic law. For example, ʿAllamah Ḥilli (who died in 726 AH) recorded in his *Ijāzah* to Sayyid Muhannā bin Sinan (see *Biḥār al-Anwār* Vol. 107, p.146) that, in addition to having studied Kulayni's *Al-Kāfi*, the works of Shaykh Ṭūsi and Shaykh Ṣadūq, he had also studied Malik bin Anas's *Al-Muwaṭṭa'*, the *Ṣaḥiḥ* of al-Bukhāri, the *Musnad* of Aḥmad ibn Ḥanbal and the *Sunan* of abi Dāwūd. He also studied under the Shāfiʿi jurist Najdmuddin ʿUmar Katibi (d. 675 AH), and was so well acquainted with Muʿtazilite theology and methodology that, in her PhD thesis, *The Theology of ʿAllamah Ḥilli,* Sabine Schmidtke opined his theological works to be a marriage of Muʿtazilite and Imāmiyah theology. Although I do not agree with that opinion, her work nevertheless illustrates that ʿAllamah Ḥilli did not limit his studies to one sectarian source. In his treatise on comparative Islāmic law *Tadhkerat al-Fuqahā*, ʿAllamah Ḥilli presents opinions of the Imāmiyah, Ḥanafi, Maliki, Shāfiʿi and Ḥanbali schools of law on a wide variety of subjects.

ʿAllamah Sharafuddin did not either restrict his investigation of *ḥadīth* to Shīʿah teachers, as is evidenced in his book *The Right Path* (*Al-Murājʿāt*). He travelled to Damascus, Makkah, Madinah and Cairo to obtain the authorization of a diversity of traditionalist scholars.

How to deal with new subjects

When a *mujtahid* is faced with new subjects that need the clarification of Islāmic law, two methodologies are available.

1. To apply the basis of a known subject to another subject, and provide the same ruling. This, referred to as analogy — *qiyās* — was strongly supported by Abu-Ḥanifa. Alternatively, the 'spirit of the text' rather than the text itself may be examined. This is referred to as 'Study of the Objectives of Legislation' rather than the 'Study of that which is Apparent' — an approach strongly supported by Maliki jurists and propounded by Imām Shaṭibi in his book *Al-Muwāfaqāt fi Maqāṣid al-Sharīʿah.* Dr Aḥmad Raysuni presented his study on this subject for his doctoral thesis.

   Raysuni, Aḥmad: Imām Shaṭibi's Theory of
   The Higher Objectives and Intents of Islāmic Law,
   The International Institute of Islāmic Thought 2006, Herndon, USA

The majority of Sunni scholars regard the approach outlined by Shaṭibi to be the most practical methodology by which to reform *ijtihād*.

2. The Imāmiyah, on the other hand, recognize intellectual reasoning as being the fourth source of Islāmic law. (The consensus of learned scholars who reflect the opinion of the error-free Imāms is the third source.) For the purpose of *ijtihād* they undertake comprehensive examination of each *ḥadīth* and — in conjunction with this valuable tool — see little purpose or benefit in using *qiyās* or Shaṭibi's methodology. Furthermore, their lengthy debates have proven *qiyās* and 'The Objectives of Legislation' to be both inefficient and implausible tools for *ijtihād*. Detailed evidence to support their view was presented by Sayyid Muḥammad Taqi Ḥakim ﷺ in his Principles of Comparative Jurisprudence — *Al-Uṣūl-al-'Ammah lil Fiqh al-Muqārin*.

Conditions of ijtihad

A *mujtahid* must be a competent Muslim of sound mind with the intellectual capacity to form independent judgements. In many *aḥadīth*, the *mujtahid* is regarded as being a successor to the Prophet ﷺ. This is in respect of the ability to elaborate on rulings and guide the community to 'things that please Allāh'. Trustworthiness, reliability and righteousness are thus key qualities of a *mujtahid*. Those who fail to meet one or more of these requirements are disqualified from undertaking *ijtihād*.

> Shahid II (***Imāmi*** *mujtahid* d. 966 AH) said, 'Knowledge of the following six introductory studies is essential in the process of *ijtihād*: Theology, Principles of Jurisprudence, Arabic grammar, Morphology, Lexicology and an unquestionable comprehension of the Qur'ān, Sunnah, Consensus and Intellectual reasoning.'
>
> **Al-Rawḍah al-Bahiya – The Brilliant Garden – Vol. 1, p.236**

> Ibn 'abd al-Shakur (***Ḥanafi*** scholar) said, '*Ijtihād* requires Faith, knowledge of the Qur'ān, at least of the 500 *āyat* that deal with rulings, knowledge of the Sunnah – at least of the 1,200 *aḥadīth* that deal with jurisprudence, ability to identify the authenticity of narrators and a familiarity with consensus. However, being righteous is only required for those who accept his *fatāwā*.'
>
> **Musallam al-Thubūt Vol. 2, p.320**

> Al-Ghazali (***Shāfi'i*** scholar d. 505 AH) said, 'While eight branches of knowledge are needed for *ijtihād*, four are essential, the others being only introductory. The essentials are, Qur'ān, Sunnah, Consensus, and Intellect. The introductory ones, Methodology of Argument, Arabic Grammar, knowledge of 'abrogator and the abrogated', and ability to recognize authentic *ḥadīth*.'
>
> **Mustaṣfā al Uṣūl Vol. 2, p.101-03**

Al-Qarāfi (***Māliki*** scholar) offered a similar statement to Al-Ghazali's in his book *Sharḥ Tanqiḥ al-Fuṣūl*, p.194.

Ibn Qudāmah (***Ḥanbali*** scholar) said, 'The *mujtahid* must have complete comprehension of the Qur'ān, Sunnah, Consensus, Presumption of Continuity, and Analogy. As for knowledge of the Qur'ān, he must be well versed in the 500 *āyat* concerned with rulings, not necessarily by having committed them to memory, but knowledge of how to refer to them when needed.

As for Sunnah, he must be well acquainted with the *aḥadīth* that concern rulings, regardless of them being many or limited. Knowing that a *ḥadīth* in question has not been abrogated is sufficient for the process of *ijtihād*. Differentiation between strong and weak *aḥadīth* is a further requirement.

As for consensus, it is sufficient to know if the issue in question has been dealt with by previous *mujtahid*s or if no precedent exists.

> Knowledge of Grammar and Arabic language, ability to recognize both explicit and ambivalent texts, what is literal and what metaphorical, what is general and what is specific, are essential requirements in the process of *ijtihād*.
>
> **Rawḍat al-Naẓer, p. 190**

Al-Shawkani (***Zaidi*** scholar) said, 'There are five requirements for a *mujtahid*:

1. Comprehensive knowledge of the Qur'ān and *aḥadīth*;
2. Comprehensive knowledge of the issues that apply to consensus;
3. Comprehensive acquaintance with the Arabic language to enable him to arrive at conclusions from the Qur'ān and *aḥadīth*;

4. Comprehensive knowledge of the Principles of Jurisprudence; and

5. Ability to recognize the abrogator and the abrogated.'
Irshād al-Fuḥūl, p.250

It is easy to see that the all the Schools of Islāmic Law have most of the requirements for a *mujtahid* in common, but refer to them in greater or lesser detail.

Sources for Islāmic law accepted by various schools of thought

	Source	Imāmiyah	Zaidi	Ḥanafi	Ḥanbali	Shafi'i	Maliki	Ibaḍi
01	The Qur'ān	Yes	Yes	Yes	Yes	Yes	Yes	Yes
02	The Prophet's Sunnah	Yes	Yes	Yes	Yes	Yes	Yes	Yes
03	Ahl al-Bayt's Sunnah	Yes	Yes	No	No	No	No	No
04	Consensus	Yes	Yes	Yes	No	Yes	Yes	Yes
05	Intellectual reasoning	Yes	Yes	Yes	No	Yes	Yes	Yes
06	*Qiyās*	No	Yes	Yes	Yes	Yes	Yes	Yes
07	*Istiḥsan*	No	Yes	Yes	No?	No	Yes	Yes?
08	Public interest	No	No?	No	Yes	No	Yes	Yes
09	*'Urf*	Yes	Yes	Yes	Yes	No	Yes	Yes?
10	Companions' acts	No	No	Yes	Yes	No	Yes	Yes

Examples of the various views:

1. Insurance and assurance

Although the concept of insurance is relatively new, marine insurance was introduced to England by the Lombards sometime in the 16th century. It only grew in importance after the English Civil War when London became a centre of trade. Because the Royal Exchange, the traditional meeting place of merchants, lacked comforts and convenience, merchants frequently eschewed it for the comforts of the new coffee houses that began to appear at that time. In contrast to inns and taverns, these proved congenial meeting places for serious and clear-headed discussion.

The insurance business in those days involved an agent or 'insurance office', hawking a new policy around the city for subscription, by those with private means prepared to take a share of the risk in return for a portion of the premium. An insurance office's reputation hung upon its ability to ensure that policies were only underwritten by men of sufficient financial integrity who could meet their share of any claim. Little is known of Mr Lloyd or the coffee house he opened in 1688, but his clientele must have consisted of the most influential ship's captains, owners and overseas trade merchants, for it to become such an important underwriting centre. The first record of Lloyd's coffee house was in a *London Gazette* advertisement in the late 1680s in which it was announced that a reward would be paid there, in return for information on stolen watches.

For some years, intermittent attempts were made to set up a securely based insurance corporation (or chartered company), to bring some regularity to the disorderly commercial world of the early Georgian period. Too much wealth and too little employment had given rise to wild investment speculation that culminated in the 1720 collapse of the South Sea Company and the ruination of thousands of investors. The 'South Sea Bubble' was the most spectacular of many frauds and failures of corporate enterprise, at a time when disreputable companies ballooned and burst overnight. Thus, in 1720, the British Parliament enacted a piece of legislation (the 'Bubble Act') that granted charters to the Royal Exchange Assurance and the London Assurance Companies, and prohibited marine insurance by any other corporation or business partnership. After a period of evolution this culminated in the incorporation of Lloyd's by Act of Parliament in 1871.

Today, legislation to cover insurance is part of the fabric of every civilized country.

However, when this type of business found its way to the Muslim world, towards the end of the 19th century, when exports of cotton from Egypt needed to be insured against the risk of fire, it drew forth a wide variety of reaction from Muslim jurists.

One opinion is that insurance is prohibited in Islām. This is supported by many jurists in Egypt, in addition to a few in Najaf and Qum, who base their opinions on one or other of the following justifications.

1. That no such contract was known at the time of the Prophet ﷺ, the companions or the Imāms ﷺ. They claim that only contracts of the types known by the above categories can be considered to be binding.

2. Insurance leads to ambiguity and lack of information. Despite pre-determined premiums being paid for *x* years, the final amount of any payout is not predetermined and, indeed, may or may not even occur.

3. Because insurance is similar to earned interest – *ribā*. As *ribā* is prohibited, it is analogous that insurance needs also to be. When a person pays £500 per annum to insure their car they might receive £5,000 if it is written off. Such 'profiteering' ought to be regarded as earned interest. It is a matter of fact that *ribā* applies specifically to loans, while 'profit', which may or may not result from an insurance contract, has nothing whatever to do with borrowing or lending.

4. Insurance contains risk, uncertainty and hazard – *gharar*. As it is reported in one *ḥadīth* that 'The Prophet ﷺ prohibited sales in which *gharar* plays any part', it follows that insurance cannot be permissible either.

A second opinion is that insurance represents a type of contract that was known at the time of the Prophet ﷺ. This was suggested by a great jurist of Najaf, Shaykh Ḥusayn Ḥilli whose lectures, compiled by Sayyid ʿIzzudin Baḥr al-ʿUlūm, appeared as '*Discourses on Jurisprudence*' – *Buḥūth Fiqhiyah*. He suggested that insurance be recognized as a mutual agreement – *ṣulḥ* – or as a conditional gift.

Ayatollah al-Khoei accepted his opinion regarding conditional gifts and, according to his ruling, the same conditions apply to insurance as apply to such gifts. That is to say, the insured should regard, and undertake to 'gift' premium instalments, with the clear understanding that the insurer will return the amount mentioned in the policy, as and when the policy conditions apply.

A third opinion is that insurance is indeed an independent contract which meets all the requirements needed for agreements to be valid in Islāmic Law. None of the justifications for its invalidity apply as insurance agreements are of the type made at the time of the Prophet ﷺ. This is Ayatollah Sistani's opinion and I encourage that view with my advanced students. This case was

put forward by Sayyid Abdul Hadi Ḥakīm, who obtained a PhD in Islāmic Law, on the basis of his 500-page dissertation on this matter.

2. In vitro fertilization – IVF

When artificial insemination was first discussed, Muslim jurists expressed differing opinions.

The first opinion was that it is *ḥarām* for one of the following reasons.

1. That it would entail non-*maḥram* doctors touching the pudenda of Muslim women.
2. That it would require masturbation to obtain semen.
3. And, according to many Sunni jurists, because they thought it akin to fornication – *zina*. They based their opinion the analogy (*qiyās*), that as adultery is a major and prohibited sin IVF must be prohibited too.

The second opinion rejects the validity of *qiyās* for this subject matter on the basis of the technical meaning of the term *zina*. In Islāmic law this refers specifically to an act of physical intercourse: to be precise, when a male inserts his penis into the vagina of a female who is not his wife. IVF clearly does not involve any such act. As to members of a medical team touching the private parts of the subjects, we need to consider and weigh the necessity of both of these acts, (a) to help a woman desperate to conceive and fulfil her biological motherhood function, and (b) to involve a medical team. There are invariably sizeable sections in books on *Principles of Jurisprudence*, dedicated to the *Table of Priorities – Tazāḥum*. For certain categories, a *mujtahid* will refer to this in order to examine the priority of one circumstance over another. As for masturbation, there are alternative and permissible means to obtain semen and eggs.

Baḥth al-Khārij-level students at the London *ḥāwzah* regularly discuss the circumstances in which IVF can take place and the acceptability of surrogate motherhood.

One may use the needed fertilized eggs and request the others be destroyed. To be on the safe side, one should have someone witness that they are destroyed and not misused. Such action is not regarded as abortion, as by definition this can only occur after a fertilized egg is lodged in the womb.

3. Organ donation, cosmetic surgery, genetic engineering

While all the above are relatively new to medical science, the first reaction of some jurists was clearly not favourable. Their one word on these subjects was 'no'. I do not propose we discuss the psychology behind that negative response but look, rather, in some depth at the sources of *ijtihād*.

Those who object to the above base their rejection on one *āyah*, Qur'ān 4:119, in which Allāh revealed that Shayṭān had said, 'I will surely lead them astray, create vain desires in them and command them to slit the ears of cattle and change Allāh's Creation.' To these jurists it is perfectly clear that those who conspire to change Allāh's Creation work in accord with Shayṭān's plans. However, if we examine this *āyah* we find:

1. This *āyah* is to be read in the context of Qur'ān 5:103 – 'Allāh has not sanctioned a *Baḥirah, Sā-ibah, Waṣilah* or *Hām* – it is those who do not believe who fabricate this lie. [Pre-Islāmic superstitious belief demanded that domesticated beasts had their ears slit and be set free in particular circumstances. The terms above denoted their type and status.]

2. Principles of jurisprudence clearly show that some *āyat* convey unrestricted and unconditional concepts – *muṭlaq* – while other *āyat* refer to concepts which are restricted – *muqayyad*. It is not possible that the *āyah* that records Shayṭān's desire to change Allāh's Creation, is of the unrestricted type because that would suggest that any alteration of nature is unlawful – *ḥarām*. This would cover the construction of bridges, dams, tunnels through mountains, the digging of wells, diversion of river water to irrigate fields, or the extraction of teeth, to name but a few of the myriad things that alter Allāh's Creation in one way or another. Not one jurist has ever deemed such acts *ḥarām* – in spite of the fact that they clearly effect a change in Allāh's Creation. Indeed, the use of henna to dye an elderly person's white beard is considered to be a *sunnah*, despite changing Allāh's Creation in this way. We have therefore to conclude that the above rejection cannot be based upon Qur'ān 4:119.

   Also, books on the Principles of Jurisprudence include more or less comprehensive sections on *Principles of Permissibility – Aṣālat al-Ibaḥah* – and the majority of jurists support such inclusions. Indeed, they refer to them when called upon to consider the permissibility of any new subject that has no clear prohibition in either Qur'ān or *aḥadīth*.

However, we do not rule out the significance of moral debate regarding the above issues.

As for organ donation, anyone may incorporate in her/his will the wish that specific organs or body parts be used to save the lives of Muslims who need them.

4. Games of chance

Gambling – *qimār* – is prohibited in Islām. Earnings based on games of chance, rather than on an individual's intellectual, entrepreneurial or physical efforts, are not permitted in Islāmic law. Allāh tells us in the Qur'ān, 'O you who believe, intoxicants and games of chance, the dedication of stones [as idols to be worshipped] . . . are the handiwork of Shayṭān, keep away from them so that you may become successful' (Qur'ān 5:90).

The foundation of business in Islāmic law cannot be based upon 'false means'. It is made clear in many *aḥadīth* that this Qur'ānic term refers specifically to games of chance. As lotteries are unashamed games of chance they are clearly prohibited to Muslims. However, in-depth analysis of this subject resulted in both Ayatollah al-Khoei and Ayatollah Sistani making the following distinctions:

1. If a person spends one dollar with the intention of acquiring an opportunity to win the jackpot in a game of chance, it is clearly gambling and prohibited in Islām.

2. If, on the other hand, that person's intention is to donate the dollar to the charities that are supported by the lottery, and they themselves have no intention to participate in the lottery and do not anticipate any return whatever, any gains that might result from their action would be considered lawful or *ḥalāl*.

To arrive at the above opinion one must appreciate that in Islāmic law, all agreements, contracts and financial involvement are considered on the basis of intention (see chapter 15). The merit of all acts of worship is based on the intention to draw closer to Allāh – *Qaṣd al-Qurbah*. An intention may be to gamble or make a donation – and different rulings apply to different intentions. This is the foundation upon which my opinion on this subject is based.

Another viewpoint regarding this subject comes from Ayatollah Sayyid Muḥammad Sa'eed Ḥakīm, who views lottery tickets as lawfully exchangeable items and thus perfectly legal to purchase.

These are but a few examples of contributions *mujtahids* make in considering contemporary issues that require firm, clear responses for the Muslim community. It is obvious that when subjects call forth a wide variety of opinions, one should defer to the opinion of the jurist with the greatest experience, intellectual ability and wisdom – described in books of *fatāwā* as 'Following the most learned'.

General principles of jurisprudence

As the sources of Islāmic law are limited and contemporary problems unlimited, one may question how jurists – *fuqaha* – deal with the process of *ijtihād* to provide verdicts on an ever-increasing variety of issues.

The answer lies with General Principles of Jurisprudence, in which the *faqih* devotes utmost effort to locate appropriate principles to apply to the subject in question. For example, if questioned about Islāmic rulings on 'Organ Transplant', he/she will search within the original sources of law, i.e. the Qur'ān, *aḥadīth*, consensus of earlier jurists, and employ intellectual reasoning (including analogy (*qiyās*), in order to confirm its validity). If he/she cannot trace suitable texts or proofs regarding its permissibility or non-permissibility, he/she is obliged to refer to general principles, such as the principle of permissibility (which is discussed in chapter 2).

Based on the above, the *mujtahid* will conclude that organ transplants are permissible within Islāmic law. He or she will apply the same method, using other general principles, to give answers to specific problems.

Many general principles appear in the reference books of Jurisprudence but here we will only discuss thirty:

1. Possession Indicates ownership
2. The principle of permissibility
3. The principle of validity
4. The principle of purity
5. Islāmic law does not occasion harm

6. Islāmic law does not occasion unbearable hardship
7. Certainty is not challenged by doubt
8. When a text is clear, interpretations are unacceptable
9. Liability for damage
10. Avoidance of disadvantage has priority over considerations of benefit
11. Rulings regarding conflicts in evidence
12. Table of priorities
13. Casting lots
14. Ends do not justify means
15. Contracts are based upon the intentions of participating parties
16. Not to cooperate in the perpetration of sinful actions
17. Those who have been deceived are entitled to redress
18. Actions undertaken with good intent do not incur liability
19. Nursling nurture establishes ties equivalent to blood relationships
20. Reliance on the 'Muslim market'
21. Invalid terms and conditions of contract
22. Custom circumscribes religious rulings
23. Summary knowledge is as binding as detailed knowledge
24. Persistent doubts are to be ignored
25. All liquids that cause intoxication are considered impure
26. Inability to fulfil a religious duty does not absolve one from obligation
27. Dissimulation and its manifestations
28. The execution of a will has precedence over distribution of assets
29. Speculative analogies do not provide valid bases
30. Changes of circumstance lead to changes in rulings

CHAPTER 1

Possession indicates ownership

To understand this principle we need to examine the following sections:

1. The definition of 'Hand' and 'Possession'
2. The basis of this rule
3. Its universality
4. Conflict between this rule and the presumption of continuity
5. The possessed items

1. The definition

In the Arabic language, the above principle may be transliterated as *Al-yad amārah ʿala al-melkiyah*. Although *yad* literally means 'a hand', to obtain a clear understanding of the role of a hand vis-à-vis possession, we need to familiarize ourselves with the variety of usages of the word *yad*.

In addition to its literal meaning, *yad* may also describe a handle, power, control, authority, assistance and help. Used in Islāmic law, 'hand' specifically indicates possession or actual control. The holder of control is thus known as *dhul yad*, rightful possession as *yad muḥiqah* and, conversely, unrightful possession as *yad mubṭilah*.

The application of this principle becomes apparent when one observes whether the manner in which a person treats something in their possession accords with the manner in which others treat similar items that they own. We then conclude that he/she is indeed the real owner, and rule out any possibility that the item has been stolen. However, if another person lays claim to the ownership of that item, they have the responsibility to prove the

validity of their claim. If they fail to prove that, all legal systems accept that rightful ownership has been accurately determined via the above rule. For example, a person who is taking full shopping bags home is acknowledged to be the rightful legal owner of the bags' contents. Any who wish to claim otherwise are required to submit convincing evidence to support their claim.

2. The basis of this principle

From aḥadīth

a. Ḥafṣ ibn Gheyath narrates from Imām Ṣādiq ﷺ that he was asked: 'When I see something in the possession of another, may I bear witness in court that that person is the owner?' Imām Ṣādiq ﷺ replied in the affirmative. The questioner then asked, 'Because it might rightfully belong to someone else, should I not bear witness that I found it in their possession rather than witness that it belongs to them?' When asked by Imām Ṣādiq ﷺ if it was lawful to buy that item from them, the man replied that it was. The Imām then asked, 'If it might belong to someone else how can it be purchased to become your legal property?' The Imām ﷺ concluded, 'If you do not rely on ownership being valid, no business transaction can ever be possible or valid'.

   This *ḥadīth* has been reported on the authority of: Kulayni, in *Al-Kāfi* Vol. 7, p.387 and Sadūq, in *Man La Yaḥḍuruhu al-Faqih*, Vol. 3, p.31 and Shaykh Ṭūsi, in *Al-Tahdhib* Tahdhib al Aḥkām? Vol. 6, p.261.

b. 'Uthman ibn 'Isa and Hammad ibn Uthman both narrate from Imām Ṣādiq ﷺ that a conversation took place between Imām 'Alī ﷺ and Abu Bakr regarding ownership of Fadak. Imām 'Alī ﷺ records in *Nahj al-Balāghah*, letter number 45, that 'Fadak was all that we possessed under this sky. However, when a group of people lusted after it, the other party with-held themselves from it knowing that Allāh is the best of arbiters.' The conversation is recorded as follows:

   Imām 'Alī ﷺ: Do you judge us contrary to Allāh's rulings?

   Abu Bakr: No.

   Imām 'Alī ﷺ: If I laid claim to an item in the possession of a Muslim, whom would you order to provide two witnesses?

Abu Bakr: I would ask you to provide two witnesses.

Imām ʿAlī ﷺ: And if a Muslim claimed an item in my possession, would you ask me to provide two witnesses to attest to the fact that I had owned it during the Prophet's lifetime as well as after his demise?

Abu Bakr: (Made no comment and remained silent.)

Wasa'il al-Shīʿah Vol. 27, p.293

This *ḥadīth* clearly indicates that the possession of, or ongoing authority over, an object or commodity conveys legal recognition of ownership and rightful possession.

The chain of narrators of the above *ḥadīth* has been recognized to be both sound and strong.

c. Yunus ibn Yaʿqub narrates the opinion of Imām Ṣādiq ﷺ regarding a wife who predeceases her husband, and a husband who predeceases his wife. The Imām ﷺ said, 'The wife may take the household effects that are normally used by women, whilst items normally utilized by both men and women are to be shared with the deceased's heirs. Whoever holds control over an item is deemed to own that item.'

Wasa'il al-Shīʿah Vol. 26, p.216.

Although this statement is part of the ruling of inheritance between a spouse and the deceased spouse's heirs, jurists believe that it conveys a general ruling that has validity beyond matters of inheritance. Especially when we observe 'Whoever'. . .

d. Kulayni narrates from Muḥammad ibn Muslim, on the authority of Imām Baqir ﷺ, that when he ﷺ was asked for a ruling concerning money found in a house, he ﷺ replied, 'If the house is occupied the money clearly belongs to the occupants. However, if a house is deserted and in ruin, whoever finds money in it acquires all rights to it.

Wasa'il al-Shīʿah Vol. 25, p.447

From consensus

Many jurists have relied on consensus to support the principle that possession Indicates ownership. However, according to Imāmiyah jurists, consensus is acceptable only in instances that reflect the approval of the error-free Imām ﷺ, and as Ayatollah Bujnordi mentions in his book *Al-Qawa'id al-Fiqhiyah*, Vol.1, p.113, the above consensus does not meet the necessary criterion and thus cannot be relied upon.

It is safe to conclude that there is no need to depend on consensus as its basis is explained under the next heading 'Common practice'.

Common practice

There is no doubt that all peoples, regardless of belief, race or degree of civilization, regard 'the one who holds authority over any item' as being its real owner. If any wish to make claims to the contrary, they are obliged to provide evidence to support that claim.

Throughout history, 'common practice' has been widely accepted in Muslim communities and no Imām or Caliph has ever rejected it.

When people observe that someone is building or demolishing something on a piece of land or letting a property for rent, they assume that unless someone else challenges that action, it is being carried out by the owner of the property – or someone acting on her/his behalf. Indeed, all legal systems consider possession as constituting 'nine-tenths of the law'.

Consideration of all the available sources leads one to conclude that this is indeed a general principle that has universal acceptance.

3. The universality of this principle

There is no doubt that the above principle is universal and applicable to all peoples, Muslim or non-Muslim. When one seeks to purchase a carpet, a motor car, or an item of furniture, the person or company that holds authority over that item is automatically accepted as its legal owner.

When a Muslim trader wants to import five tonnes of sugar from Cuba he opens a letter of credit and proceeds to place his order, without any need to investigate if the supplier is the real owner of the merchandise or not. This is because the above-mentioned principle is recognized by him to provide valid proof of ownership. When a tourist goes to Singapore and buys an antique clock, no doubts are entertained or investigation undertaken,

regarding the item being legally owned by the vendor. This is because it is common practice to recognize the validity of this principle.

4. Conflict between this rule and the presumption of continuity

One of the tools *mujtahids* use to deduce laws from their sources is the 'presumption of continuity' – *istiṣḥab*. This will be fully discussed under principle 7, 'Certainty is not challenged by doubt'.

What happens when these two principles conflict? For example, when 'Presumption of Continuity' leads to belief that a motor car was for some years owned by Mr A, but the 'Principle that Possession indicates Ownership' testifies to that same motor car being indeed owned by Mr B.

Although chapter 11 covers conflicting evidence and provides guidelines to the resolution of such conflicts, we will summarize the above case: Even though reliance on the principle of possession is universal, we need to bear in mind that it is normal for the ownership of a motor car to be frequently transferred from one person to another. As ownership may even sometimes be repeatedly changed in the same month, it may be concluded that the principle of possession indicates that ownership holds precedence over the presumption of continuity. Thus, certainty is challenged by another strong proof and not by any doubt.

5. The possessed items

It is not necessary for ownership to be based upon trade or purchase. There are items from 'ownerless' sources, such as fruit from trees on common land, water drawn from rivers or springs, and creatures hunted or fished in areas where there is no private ownership. Some items may also come into a person's possession through inheritance or by their being a beneficiary of an assurance policy.

In all the above examples, when we find an item in the possession of a person we recognize that person to be the legal owner – without consideration as to how that item was acquired. However, if another person presents strong evidence to show that it is they who own the item, the above principle is rendered invalid.

Zurarah then said, 'There are sometimes two traditions, both of which either agree or disagree with the view held by the 'masses'. What should we to do in those instances?' Imām Baqir ﷺ replied, 'Select the tradition that is closer to 'precaution' and reject the other.'

> Zurarah then asked, 'How do we fulfil our duty if both traditions accord with 'precaution?' Imām Baqir ﷺ replied, 'In such cases you may choose either.'
>
> **'Awali al la 'ali Vol. 4, p.133**
>
> **A similar tradition is recorded in Wasa'il al-Shī'ah Vol. 27, p.106**

It is safe to conclude that the sequence of criteria for choosing one conflicting *ḥadīth* over another is that it should be well known, that its narrator is considered the most reliable, that it does not concur with the viewpoint of the 'masses', and that its content is closer to precaution. These measures are accepted by all *fuqaha* of the school of *Ahl al-Bayt* ﷺ for the assessment of conflicting *aḥadīth*. However, it is reasonable to say that the crux of all such decisions rests upon the issues of reliability and precaution.

The definitive – *qaṭ'i* – and the speculative – *ẓanni*

We have already explained the textual terms 'unequivocal', 'manifest' and 'ambivalent' (see chapter 8), from which it is apparent that 'unequivocal' texts have definitive content, while 'ambivalent' and 'manifest' texts have speculative content. It follows that no conflicts exist between the definitive and the speculative and that *fuqaha* give preference to the definitive over the speculative.

A *ḥadīth* that has successive reliable narrators is classified as *mutawāter*. *Mutawāter aḥadīth* can never be challenged by single conflicting reports – *khabar wāḥid* – because *mutawāter* texts are definitive and *khabar wāḥid* texts are speculative.

An example of this is the renowned *ḥadīth* that rigorous factual analysis has established as being *mutawāter*, 'Two Precious Things' – *Thaqalain* – that states that the Qur'ān and the Prophet's progeny are the 'two most precious things', and the *khabar wāḥid* narration that claims the Qur'ān and the Prophet's Sunnah are the two most precious things.

Reconciling differences

When conflicting views appear in two different *aḥadīth*, *fuqaha* investigate the people who narrated them as well as the circumstances behind both reports, before deciding if their differing views are able to be reconciled.

- For example, one *ḥadīth* records that it is unlawful to sell excrement while another records that this is permissible. *Fuqaha* investigation reveals that both narrators are reliable and that both *aḥadīth* are authentic, but discloses that the contexts to which each refer are entirely different. The subject of one concerns the illegality of selling human excrement; the subject of the other is the legality of selling 'manure', that is, the excrement of those animals that are permitted for human consumption.

This is the basis of Shaykh Ṭūsi's statement, 'It is illegal to sell the excrement of animals that are not regarded as suitable for human consumption.' Human excrement clearly falls within this category. Refer to *Al-Mabṣūṭ* Vol. 2, p.167.

- When one *āyah*/*ḥadīth* indicates that a certain action is required and another indicates that it may be omitted, *fuqaha* resolve the conflicting statements by establishing if the requirement is a 'categorical' or 'recommended' one. While it is clear that categorical statements are not to be ignored, statements that are recommendations are not obligatory. Consider, for example, the Qur'ānic statement regarding the documentation of loans, 'O you who believe, when you give or take a loan for a fixed period, record it in writing' (Qur'ān 2:282). However, from the subsequent *āyah*, *fuqaha* understand that the statement is a recommendation and not an obligation, for it reads, 'And if one of you deposit anything on trust, let the trustee discharge his/her trust.' Here the word 'trust' implies that creditors may trust debtors in the absence of written records being made.

- A text that makes general comments concerning a subject can be reconciled with another that is directed to a specific issue. For example, one text states, 'You must respect scholars', another, 'Do not respect scholars who follow the commands of unjust rulers.' There is no conflict or disagreement between these texts because the latter is specifically focused on, 'the commands of unjust rulers'.

- While all know that rules and exceptions exist, none claim that exceptions negate or contradict rules. However, exceptions need to be understood in the context of the rules to which they apply. For example, Islāmic law dictates that interest may not be levied on loans. Despite this, there are *aḥadīth* that report that no usury exists between a father and a son. Thus, a loan made by a father to his son may specify that a payment of interest be made at the time the son repays the loan to his father.

Another example: Muslims are not permitted to consume meat of the pig or of any animal that has not been slaughtered in accordance with Islāmic requirements. However, an exception is made in circumstances in which it is deemed that such prohibition might result in death. Refer to Qur'ān 2:173.

It is apparent that rules of reconciliation and preference are grounded on the presupposition that conflict does not occur in Divine Law. Therefore, it follows that if two pieces of textual evidence cannot be implemented, one of them will be able to be. Should a *faqih* determine that it is not possible to reconcile two specific texts, he rejects both of them and seeks further sources.

Can consensus conflict with the Qur'ān or *aḥadīth*?

All schools of thought acknowledge the Qur'ān and *aḥadīth* to be the primary sources of Islāmic law. Reference to consensus amongst *fuqaha* is only permissible in circumstances in which no clear text exists within both these primary sources.

It is inconceivable that consensus could exist about matters that conflict with either the Qur'ān or a clear text. This is discussed in chapter 8, 'When a text is clear, interpretations are not acceptable'.

Abrogator and abrogated

No Islāmic scholar denies that the Divine revelation of Islām has abrogated Jewish and Christian injunctions, nor that a few initial prophetic injunctions have been abrogated by later injunctions. For instance, the Qur'ān records the abrogation of Jerusalem as the direction of prayer when Divine Will changed that to Makkah.

However, Islāmic scholars are not in agreement regarding the prospect of one Qur'ānic ruling abrogating another, or of authentic *ḥadīth* and

consensual opinion abrogating Qur'ānic rulings. In *Al-Nāsikh wal Mansūkh*, Abu Bakr al-Naḥḥas claimed that 137 *āyat* have been abrogated. However, the factual analysis of Ayatollah Al-Khoei shows none of those to be *de facto* abrogations. In arriving at his conclusions Ayatollah Al-Khoei referred to Qur'ān 4:83, in which Allāh tells us, 'Will they not then ponder on the Qur'ān? If it had been from any other than Allāh, they would have found therein much incongruity.' Refer to *The Prolegomena to the Qur'ān* (Oxford University Press), p.193.

As an example, one of the many claimed Qur'ānic abrogations by scholars such as Al-Naḥḥas is the *āyah* that deals with *'iddah* – the waiting period of abstinence from remarriage for widowed women. In Qur'ān 2:234 we learn that widows must observe *'iddah* of four months and ten days following the death of their husband. This applies to all widows, regardless of their being pregnant or not at the time of their husband's death. However, in Qur'ān 65:4 we learn that the *'iddah* of pregnant women ends when their child is delivered. This ruling applies equally to widows who are pregnant and must wait until the birth of the child. According to this second *āyah*, a pregnant woman whose husband dies the day she gives birth could be considered to have completed her *'iddah*, while, according to the first *āyah*, her *'iddah* is still four months and ten days.

Imāmiyah jurists, in considering both rulings – the time that the widow still has to carry her child, and the prescribed period of four months and ten days – conclude that a pregnant widow's *'iddah* is the longer of these two periods.

Contradiction between obligation and prohibition

While a single act cannot be both obligatory and prohibited, there is a possibility of obligatory acts being combined with prohibited acts in the fulfilment of certain duties. For example:

- Listening to music while offering an obligatory daily prayer.
- Holding a glass of wine in one hand at a fund-raising event while giving an envelope that contains a donation – *zakāt* – with the other.
- Performing ablution with usurped water (taking it without the permission of its owner), etc.

In all of the above examples, texts that refer to each of the described actions are clear. However, it is in their being combined that the clarity of what is right and what is wrong becomes confused. Does listening to music during prayer invalidate the prayer? Does drinking wine while giving *zakāt* render such *zakāt* unacceptable? And, is ablution performed with usurped water valid?

This issue is known by scholars of the Principles of Jurisprudence as 'The combination of command and prohibition' – *Ijtimāʿ al-amr wal-nahy*. There are two differing opinions – some opine that it is impossible to combine opposites; others understand it to represent the two sides of the same coin, each with its own ruling. One is to be rewarded for one's obligatory actions and at the same time be punished for one's sinful actions.

We know that an essential requirement for an act of worship is for it to be performed with the intention of drawing closer to the Almighty – in utter submission to Him. How is it possible for an act of disobedience to achieve such an objective? Piety and righteousness are the only criteria for the acceptability of actions (Qur'ān 5:27). The behaviour of those who employ unlawful means to achieve an objective does not meet the criteria of acceptability and thus, the combination of obedience and disobedience in the above examples renders them invalid and nullifies all benefits.

CHAPTER 12

Table of priorities

Before discussing this principle we need first to clarify two issues:

1. The difference between this principle – *tazāḥum* – and the preceding one – *taʿāruḍ*. *Tazāḥum* refers to circumstances in which two rulings are binding, but in which one of them cannot be complied with. For example, when drowning people cannot be rescued without the use of a boat that the prospective rescuer does not own. In that circumstance, two rulings apply: (1) to save life and, (2) not to touch that which does not belong to one. Despite both rulings being right and binding, a potential rescuer patently cannot comply with both. This quandary is resolved when the ruling that has greater importance in the circumstances is given precedence over the other. In Islāmic Jurisprudence, the field referred to as 'Priorities' covers precisely such matters.

   Taʿāruḍ, on the other hand, concerns two conflicting texts that cannot possibly both be true. When reconciliation is not possible, the *faqih* must select the text that is most likely to be true and reject the text that lacks validity.

2. Five 'core' values are considered to have the greatest importance in the eye of the Law Maker. These are life, property, family, human intellect and public order (including religion/state). But what happens when a person is caught between two of these, as was the case in the previous example?

Allāh tells us in the Qur'ān that '. . . the slaying of a human being, unjustly or to spread discord in the land, is equivalent to the destruction of all of humanity, while the saving of one human life is akin to saving all of humanity' (Qur'ān 5:32).

Thus, nothing may be compared with the most essential aspect (life). However, justice requires the establishment of a secure society in which property, ownership and family life can be protected, and every citizen made aware of his/her limits and entitlement to privacy.

Greater importance

Intellectual reasoning indicates that, when caught between two evils, it is rational to choose the lesser evil. Similarly, when faced with two choices, it is rational to prefer the one that is of greater importance. Criteria by which to assess importance:

1. Injunctions that specify compliance within 'a limited time' frame – *wajib muḍayyaq* – have preference over injunctions that have 'flexible time' frames – *wajib muwassa'*. For example, those who go to the mosque to pray and see the floor soiled by *najasah* have a duty to: (a) remove it and cleanse the floor of all impurity and (b) offer their prayer. As the time frame for the prayer is flexible – *wajib muwassa'* – but the time frame for the removal of impurities is limited – *wajib muḍayyaq* – they must cleanse the *najasah* prior to offering their prayer.

2. Injunctions that cannot be substituted have preference over those that may be. For example, stranded travellers with a limited' supply of water may keep it to drink and not for ablution – *wuḍū'* – because there is no substitute for drinking water, while *tayamum* is the substitute for *wuḍū'*.

3. Injunctions based upon 'rational ability' have precedence over injunctions based upon 'religious ability'. For example, a person with £2,000, sufficient to cover the cost of pilgrimage – *ḥajj* – needs to repay a loan of £2,000. As there is a 'rational ability' to repay the loan, this has precedence over the 'religious ability' to perform pilgrimage. In addition, *ḥajj* is not a requirement for those who cannot afford it.

4. When a *mujtahid* concludes that a specific injunction is of utmost concern to the Law Maker, he considers it to have greater importance than other

obligations. Thus, the main pillar of Islām, prayer, is of the greatest importance and is not to be compared with anything other than 'faith'.

Equity – *istiḥsān*

While the above four criteria for *tazāḥum* are known to Imāmiyah jurists, some Sunni schools apply *istiḥsān* as an alternative methodology to achieve similar ends. Equity is a western legal concept grounded in the idea of fairness and conscience, and derives legitimacy from belief in natural rights or justice beyond positive law. (Osborn defines equity as fairness or natural justice. A fresh body of rules by the side of the original law, founded on distinct principles, and claiming to supersede the law in virtue of a superior sanctity inherent in those principles.) See *Osborn's Concise Law Dictionary*, p. 124.

According to Muḥammad Hashim Kamāli, *istiḥsān* is an important branch of *ijtihād*, and has played a prominent role in the adaptation of Islāmic law to the changing needs of society. To him, *istiḥsān* literally means to approve, or to deem something preferable. It derives from *ḥasuna*, which means being good or beautiful. In its juristic sense, *istiḥsān* is a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcements of the existing law.

Principles of Islāmic Jurisprudence, p.246.

CHAPTER 13

Casting lots

When all of the previously mentioned methods of reaching a decision have failed, there is no recourse other than to draw lots. A 'lot' is a slip of paper that bears a name, or is a common object that is typically owned by every candidate that takes part in a determination. Such 'lots' are then 'cast' on the ground, or into a receptacle, before being 'drawn' out one at a time. The named person, or owner of the object 'drawn', is thereby selected.

Dealing with uncertainties by consulting Allāh in this manner results in equitable, impartial and just answers that are accepted by all without dispute.

However, secular society views this, and similar methods, somewhat differently. (See also the English words 'allot' and 'ballot'.) For example:

> 'This is an occasion of great dignity and solemnity. It represents the first application of a principle believed by many to be thoroughly democratic, equal, and fair, in selecting . . .'
>
> **Secretary US War Department –**
> **at the start of the ballot for military conscription in 1917.**
> **Jameslindlibrary.org**

When undertaken in secret, and without sincere intention to submit to Allāh's will, such processes may lead to corruption, for example, the 'Champagne Unit' of the US National Guard, so called because it served as the vehicle through which 'sons of Houston society' were able to escape service in the Vietnam War – an option that was not made available to the sons of less privileged Americans.

The basis of this principle

From the Qur'ān

The Prophet Yunus ﷺ is recorded as having fled his people on a heavily laden ship. When it was in danger of sinking in a raging storm, the captain realized that the only way to save his ship, and avert the loss of all on board, was for some passengers to be thrown overboard. They determined who would have to perish by drawing 'lots', in other words, by appealing to the 'One who determines all things' – the 'One who is just' – the 'One who is all-knowing' – to make the selection. Unfortunately for him, Yunus's lot was drawn, which is how he came to be thrown overboard and swallowed by a whale. Refer to Qur'ān 37:139–144.

Another example is found in the revelation concerning 'Isa's mother Maryam ﷺ, being dedicated to the temple in Jerusalem. (This was to fulfil the vow that her mother Hanna had made while carrying her.) When the temple authorities disputed over who was to care for and train Maryam ﷺ they resolved the issue by drawing lots. (In this instance, the pens of the temple authorities were used.) That is how Zakaraya came to be selected. Refer to Qur'ān 3:44.

The above two Qur'ānic references are clear regarding the casting of lots as being a last resort. However, is this part of the methodology of Islāmic law?

From aḥadīth

1. Shaykh Ṭūsi narrates from Muḥammad ibn Ḥakīm (Ḥakam) that when he asked the seventh Imām's opinion, the Imām ﷺ replied, 'For those matters that remain unknowable, lots are to be drawn.' The narrator responded, 'Drawing lots may or may not reveal the truth.' To which the Imām ﷺ replied, 'One cannot fault what Allāh has ordained.'

2. Shaykh Ṣadūq narrates from Ḥariz that Imām Baqir ﷺ said, 'The first person to be selected by the casting of lots was the daughter of Imran, Maryam ﷺ. Yunus ﷺ was after that, when on three consecutive occasions his name was drawn. Yunus ﷺ was followed by 'Abd al-Muṭṭalib, who had nine sons and vowed that if a tenth arrived, he would sacrifice him in the name of Allāh. In order to

fulfil that vow after his son – ʿAbdullah, the Holy Prophet's father – was born, ʿAbd al-Muṭṭalib made ready to sacrifice the boy. However, friends and relatives begged him to draw lots, as had been done in the selection of a carer for Maryam ﷺ. In order to determine if the sacrifice of ten camels would constitute an acceptable substitute for 'Abdullah, "lots" were cast. When ʿAbd Allāh's name was drawn, ʿAbd al-Muṭṭalib offered a further ten camels and cast lots again. ʿAbdullah's "lot" continued to be drawn with each increment of ten camels, until the number of camels to be offered for sacrifice reached 100. Only then was sacrifice of camels accepted over that of the baby ʿAbdullah.'

3. Shaykh Ṣadūq narrates that Imām Ṣādiq ﷺ said, 'In irreconcilable disputes, if both parties are in agreement, the fairest method to arrive at a just decision is to draw lots.'

4. Shaykh Ṣadūq narrates from Imām Ṣādiq ﷺ that, 'A person asked for advice regarding a vow he had made to grant freedom to the first slave to come into his possession. His father had recently passed away and he, as the sole heir to his property, had inherited seven slaves. In order to fulfil his vow, he wanted to know which of those slaves he should grant freedom to? The Imām ﷺ told him that the only way to determine that was for to lots to be drawn.'
Wasa'il al Shīʿah Vol. 27, pp.258–261

It is clear from the above that even though the casting of lots is recommended for a variety of subject matter, it is NOT considered to be a valid methodology by which to determine rulings of jurisprudence. For example:

- Doubts that may be harboured by a person vis-à-vis the fast being harmful for them cannot be resolved by the 'casting of lots'.

- Three factors to be considered in relation to non-siblings that have been suckled from the same breast:

  1. If they have been suckled for 24 hours or more.

  2. If they have been suckled for a minimum of 15 consecutive feeds, and

3. If their flesh and bones have been nourished from the same bosom.

Casting lots is clearly not suitable for determining the criteria upon which *fatāwā* are based.

Many *aḥadīth* are specific about the need to implore Allāh Almighty for guidance, prior to the casting of any lots.

Conflicting witness

When reliable witnesses submit conflicting evidence to an Islāmic court, two possibilities apply: (1) to reject both, or (2) to cast lots to determine which evidence to accept. The first point matches what has already been said regarding conflicts without possibility of being reconciled. The second line of reasoning is the subject of this chapter.

> Shaykh Ṭūsi narrates from ʿAbdullah ibn Sinan from Imām Ṣādiq ﷺ that a dispute concerning a horse was referred to Imām ʿAlī ﷺ. After he ﷺ had examined the witnesses and determined them to be equal in both reliability and number, he beseeched Allāh's help and then cast lots. The lot that was drawn determined Imām ʿAlī 's decision.
> **Wasa'il al Shīʿah Vol. 27, p.255**

CHAPTER 14

Ends do not justify means

Obedience to Allāh Almighty is manifested by behaviour that pleases Him. No rational Muslim commits unlawful actions in the belief that these will please Allāh. It is clearly nonsensical to postulate that closeness to Him can be achieved through actions that distance people from Him.

Thus, it is not valid to justify visits to discos and bars with claims that it is done to enjoin others to the good. Nor, in Islāmic law, is it valid for politicians to cheat, lie or try to deceive the public with claims that after stability is achieved, all wrongs will be righted. The supreme point of honourable political behaviour is demonstrated by Imām ʿAlī 's response, when he was advised by companions to secure political authority via the provisional endorsement of Muʿawyah in Syria, and to rescind it later by dismissing him. Imām ʿAlī ﷺ refused their suggestion on the grounds that 'Ends do not justify means'.

> On another occasion people opined Muʿawyah to be more politically astute than Imām ʿAlī ﷺ. To this, he ﷺ responded, 'By Allāh, Muʿawyah is not of good judgment, he is merely deceitful and prepared to commit evil acts. If I did not despise deceit, I would be the most cunning of men. However, deceit is a sin and sin is disobedience to Allāh. Every deceitful person will be obliged to bear the banner by which they will be recognized on the Day of Judgement.'
>
> **Nahj al-Balāghah, Sermon 200**

No Muslim is permitted to poison water or bomb centres of population, even if that is thought to be the only way a battle may be won. This prohibition is

based upon the *ḥadīth* narrated by Imām ʿAlī ﷺ in which the Prophet ﷺ ordered, 'DO NOT poison non-believers' sources of water.'

Indeed, using unlawful means to achieve ends is the antithesis of achieving one's objectives. Muslims are counselled to remain honest and to adhere to Islāmic principles at all times.

> Those who try to attain objectives via sin and illegitimate action hasten their failure and guarantee their disappointment.
>
> **Biḥār al-Anwār Vol. 17, p.149**

ʿUmar ibn Saʿad was promised the governorship of Rayy – Tehran – if he killed Imām Husayn ﷺ. Driven by desire to control the treasures of Iran he readily carried out every atrocity imaginable in Karbala. However, once he had committed that most heinous of acts, Yazid denied him the governorship. It is thus clear that lawful actions are the appropriate means by which to secure honourable ends.

CHAPTER 15

Contracts are based upon the intentions of the participating parties

While none are free to suggest amendments, or alter 'acts of worship' specified by 'The Law Maker', contracts, business and transactions are all based upon the mutual agreement of participating parties. There are, of course, guidelines in Islāmic law regarding contracts:

> We are ordered to fulfil and honour our contractual commitments.
> **Qur'ān 5:1**

Believers are described as people who,

> Manage their trusts honestly and fulfil all their covenants.
> **Qur'ān 23:8 & 70:32**

The main conditions concerning parties to any contract are:

1. All parties to a contract must be 'of age' – *bāligh*. Thus, contracts concluded by minors are not valid.
2. All parties to a contract must be sane and of sound mind. Thus, contracts concluded by those who are unstable or mentally ill are not valid.
3. All parties to a contract must enter it of their own free will. Thus, contracts concluded under duress are not valid.
4. Parties to contracts that offer ownership must be the legal owners, or agents authorized by the legal owners.

5. The intentions of all parties to a contract must be clear and comprehensive, and all parties must comprehend the obligations and commitments they are committing to.

This chapter elaborates on this fifth point.

> In his book *Al-Makāsib*, Shaykh Murtaḍa al-Anṣāri writes, 'It is obvious that intention is an instrumental element of any contract. Thus, pronouncing or uttering the formula of a contract, without the sincere intention to adhere to its content, is of no value whatever.'
> **Al-Makāsib Vol.3, p.295, Edition 1420**

Clearly, commitments that are: made in jest, made light-heartedly without reflection, that have not been clearly considered, or that contain conditions that one of the parties only vaguely comprehends, have no validity.

Conflict between what is said and what is meant

Disputes occasionally arise between parties when one feels that the wording of a contract has not clearly indicated her/his intention. They may also arise when one party claims not to have been able to decipher the terms and conditions included in the small print. To avoid potential disputes, Islāmic law recommends all parties to clarify their intentions, and to clearly comprehend the terms and conditions of contracts prior to committing themselves to them. *Fuqaha* discuss the clarity required, in a variety of circumstances, for contracts to be fully understood, particularly when one of the parties is either extremely exhausted or even drunk.

Uttering a formula for an offer or acceptance by mistake, i.e. when the intention is to rent something but the phraseology is taken to imply sale, is another ground for dispute between parties.

In all the above examples, it is a judge in court who has to examine the validity of claims and pass judgement as to contracts being valid or invalid.

Change of intention leads to a change of ruling

In Islāmic law, the basis of business must not rest upon false means; thus games of chance are clearly prohibited. Some contemporary jurists have considered the lottery in the following manner. Their opinion is that if a

person pays one pound with the intention of buying an opportunity to win the jackpot, it is unashamed gambling – prohibited in Islām. However, if a person's intention is simply to donate a pound to the charitable causes supported by the lottery, without expectation of anything in return, any prizes, should these be forthcoming, are lawful. This is a clear example of change of intention leading to a change of ruling.

The link between intention and usage

To understand the role that intention plays in the validity of transactions, we compare the following circumstances:

1. An owner of a vineyard who sells his crop to a vintner understands that it will be used to produce wine.
2. If the same vineyard proprietor sells his crop to a multiple grocer, his understanding is that it will be retailed to the public.
3. There are, too, cases in which the intention of a buyer is not known and no indications exist to guide a vendor.

The consensus of jurists is that the first example is not permissible, but both the second and third are.

For a more general or universal ruling, jurists conclude that it is unlawful to participate in commercial undertakings in which the clear intention of the other party is to indulge in non-permitted activities. Vis-à-vis a person's spiritual condition, the approval of sin committed by others – not even to mention participation in it – is considered to damage the Islāmic persona.

It is worth mentioning that in many *aḥadīth* the telling of an untruth, in order to reconcile husband and wife, or two friends, is regarded as permissible: for example, a friend telling one of the parties that he/she broached potential reconciliation with the other party and found them very willing to agree to it. In this manner both parties may be encouraged to have more positive attitudes towards reconciliation. Although this example has nothing whatever to do with contracts or transactions, it clearly illustrates the importance that intention plays in relation to human actions.

CHAPTER 16

Not to cooperate in the perpetration of sinful actions

Islām orders Muslims to cooperate in good causes and charitable pursuits. Many *aḥadīth* encourage believers to support the needy and assuage the distress and anxiety of others. One *ḥadīth* makes clear that the best of people are those who benefit others most.

In contrast, Muslims are told not to participate in anything that endorses or supports aggression, unfair treatment or sinful actions. To illustrate the extent of personal responsibility – with regard to the activities and actions of others – compare the following two circumstances.

1. A printer is contracted by a publishing house to print a number of volumes on history, literature and art without knowing what the titles or contents of the books are to be.

2. A printer is approached to print a series of books to promote discrimination and religious and racial hatred, in furtherance of the political objectives of a fascist organization.

It is clear that in the first example the printer cannot be held accountable for the content of the books. However, in the second, both parties are quite clear about the nature, purpose and intent of their cooperation and thus are both held to be equally culpable and accountable.

The basis of this principle

From the Qur'ān

> Allāh tells us in the Qur'ān, 'Cooperate in goodness and piety but not in sin and transgression.'
> **Qur'ān 5:2**

This *āyah* clearly evidences the prohibition against cooperating in the perpetration of sinful actions.

From aḥadīth

1. Shaykh Ṭūsi narrates on the authority of Imām Ṣādiq ﷺ that when he ﷺ was asked about the renting of premises in which wine was to be sold, his response was that such action was unlawful.
   Wasa'il al-Shī'ah Vol. 17, p.174

2. Kulayni, citing an authentic chain of narration, reports that Imām 'Alī ibn al-Ḥusayn ﷺ said, 'Do not associate with those who oppress others.'
   Wasa'il al-Shī'ah Vol. 17, p.177

3. Kulayni, citing an authentic chain of narration, reports that when one of Imām Ṣādiq's companions told him, 'I am being coerced into building a house or repairing a dam for the oppressors of our times,' the Imām ﷺ responded, 'I do not like to assist them even in the slightest way. Those who assist oppressors will, on the Day of Judgement, be corralled together by fire until Allāh Almighty has completed His interrogation of souls.'
   Wasa'il al-Shī'ah Vol. 17, p.179

In order to create awareness amongst the community, the Imāms ﷺ warned of the consequences of cooperation with unjust rulers. For, even though the building of a house or bridge does not directly bolster such rulers, people are advised to avoid any cooperation with them on the grounds of the injustice of their regimes.

4. Kulayni narrates on the authority of Imām Baqir ﷺ, 'The Messenger of Allāh ﷺ cursed ten groups of people for being involved in the wine industry: those who cultivate vineyards, guard vineyards,

press grapes, drink wine, offer or serve wines, transport wines, accept delivery of wines, sell wines, buy wines and those whose livelihoods depend upon wine.'

Wasa'il al Shī'ah Vol. 17, p.224

It is clear from the above that in addition to those who drink wine, all who condone or promote a culture of wine drinking, who contribute or cooperate directly, or indirectly, with the production, sale or distribution of wines, are accountable for the perpetration of sinful acts.

5. Many *aḥadīth* clarify that all who are accessory to crimes are deemed guilty – to the extent of the degree of their contribution to those crimes. Kulayni reports, via an authentic chain of narration, that the verdict passed by Imām ʿAlī ﷺ in the case of a man who, abetted by a third party to block his victim's escape, pursued and murdered another, was the death penalty for the murderer and the life imprisonment of the one who hindered the victim's flight.

Wasa'il al Shī'ah Vol. 29, p.50

In Islāmic criminal law, as indeed in all other systems, those who are accessory to crimes are culpable.

Common usage

Those associated with the perpetrator or perpetrators of an act – in the absence of their protestation against that act – are held to be complicit and culpable with the perpetrators.

Followers of *Ahl al-Bayt* ﷺ are highly recommended to honour Imām Ḥusayn ﷺ via *Ziarat ʿAshūrā* – in which they condemn: those who killed the Imām ﷺ and his companions, those who were complicit in their murder, and those who heard of, but remained indifferent to, that tragic event. People not in a position to challenge oppressors should distance themselves from their actions covertly if not in a position to do so overtly.

Indirect responsibility

When we examine those who are accessory to crimes and sin we find some directly and others only indirectly involved. In the example of the cultivation of a vineyard – a farmer who has no specific intention to sell a crop for wine

production is not directly involved in the possible misuse of her/his crop. Similarly, no farmer can be held responsible for actions committed by those who have been sustained by his crop. We may thus conclude that the cultivator of the vineyard condemned by the Prophet ﷺ (see *ḥadīth* number 4 above), was knowingly involved in the production of wine. People are accountable for actions in which they knowingly participate.

Applications of this principle

Islāmic jurisprudence abounds with examples of the application of this principle, for example:

- It is prohibited to sell wood to fashion crosses or idols – Muslims may not provide materials or equipment for use in illicit activities.
- Military personnel, whose duties involve illegal/indefensible actions, cannot draw benefit from Allāh's concession to shorten the *Ẓuhr*, *ʿAsr* and *ʿIsha* prayers during travel.
- Shaykh Anṣāri quotes a scholar who was asked by a tailor if his work for the oppressor of the time had made him an accessory to the oppressor's deeds. His reply was, 'Not only you, but also the merchants who supply your cloth, needles and thread.'
  Al-Makāsib Vol.1, p.135
- Imām Ṣādiq ﷺ once said, 'Had the Umayyads not found support they would never have dared usurp our rights.
  Wasa'il al Shīʿah Vol. 17, p.199
- The sale of arms for use against the innocent is prohibited. Culpability for this covers all the vendor's personnel – and this even includes the secretaries, clerks and cleaners.
- When an oppressor asked to borrow a scholar's pen, aware that it could be used for statements, verdicts and commands, the scholar broke his pen to avoid becoming an accessory to the tyrant's deeds.

CHAPTER 17

Those who have been deceived are entitled to redress

Buyers – in contracts based upon the quality of goods offered – who discover that they have been defrauded can annul the contract and demand full refund of the purchase price. The liability for all loss, harm or compensation that results from deception rests with the perpetrators of any deceit.

Muslims are exhorted to remain honest and to shun deceit and illegal activities. As we saw earlier, ends do not justify means (see chapter 14) and none are permitted to employ dishonest measures to attain their objectives.

The basis of this principle

From aḥadīth

1. Kulayni reports via an authentic chain of narration that Imām Ṣādiq ﷺ was asked by a man – who had married a lady without having been told that she was blind in one eye – how he could have this situation redressed. The Imām's response was that as the marriage had already been consummated, the lady was entitled to keep her dowry, but that the questioner was justified in demanding redress from her father, who had deceived him by not disclosing his daughter's impediment.
   Al-Kāfi Vol. 5, p.406

It is the tradition in many Arab societies that only the ladies of the groom's family see the prospective bride prior to a marriage. Despite this, many authentic *aḥadīth* verify that couples are permitted to meet each other before they enter into what is intended to be a lifelong partnership.

2. Imām Baqir ﷺ said, 'If testimony in court results in fines, witnesses who later withdraw their testimony are required to recompense those who were sentenced on the strength of their evidence.'
   Al-Kāfi Vol. 7, p.383

Those who offer false testimony are liable for the consequences of their actions.

3. Shaykh Ṭūsi reports, via an authentic chain of narration, that when Imām Ṣādiq ﷺ was asked about people who perjured themselves in court, his response was that they remained liable for all the losses that occur as the result of their perjury.
   Wasa'il al Shī'ah Vol. 27, p.327

Common usage

All legal systems acknowledge deception to be a criminal act and that those who practise it must bear the consequences of their actions.

Estate agents who are aware of the defects and deficiencies of a property are required to disclose that information to prospective buyers. If they deceive purchasers by non-disclosure, they become liable to claims for compensation. This applies equally to agents' solicitors who do not disclose such facts, or fail to undertake customary 'searches' prior to the completion of contracts.

Applications of this principle

Vis-à-vis marriage contracts

The most common way for marriages to end is divorce. However, in certain circumstances a marriage may be terminated by annulment – a process by which the marriage contract is declared null and void by means of a legal ruling that the marriage was never a true marriage and thus never took place. Clearly the conditions for annulment do not apply in cases of divorce.

Certain defects entitle one of the spouses to have their marriage annulled. These are as follows:

1. Impotence

Impotence is a medically significant disorder that renders a man unable to perform sexual intercourse. However, Imāmiyah *fiqh* states that a wife's right to have a marriage annulled has not been ascertained until the husband is proven to be incapable of performing sexual intercourse with any other woman. For in the way that blindness is the inability to see anything, impotence is the utter inability to perform any act of sexual intercourse.

At the time of marriage a man is presumed to be aware of his ability or inability to acquire and maintain penile erection for penetrative intercourse. If he marries without declaring such a deficiency to his bride she is entitled to have the marriage annulled. The details of how impotence may be proven, and the conditions for giving a man the opportunity to have such an abnormality treated, are dealt with in the books of Islāmic jurisprudence.

2. Insanity

Those who intend to spend their lives together need to be aware of their prospective partner's qualities and failings. People who suffer from mental illnesses patently need to share that with their prospective partner. For, if such illness is not curable, it is highly probable that the bonds of marriage will be severed – a circumstance catered for by Islāmic jurisprudence.

3. Leprosy and incurable diseases

Leprosy and leucoderma are defects that entitle either party to seek an annulment of their marriage.

Leucoderma must have existed prior to the marriage and not have been disclosed before it if annulment is to be a valid option. Leprosy on the other hand is such an exceedingly contagious disease that every precaution needs to be taken to avoid it being passed to others.

4. Deformities such as untreatable vaginal obstruction

The non-disclosure of such an abnormality provides valid grounds for a husband to appeal for an annulment of the marriage. Despite circumstances

of this kind, a newly wed husband may be prepared to accept his wife's condition and remain with her.

5. Defects or deficiencies that have not been disclosed

An agreement to marry, based upon fictitious merits or undisclosed circumstances, entitles the party that has been misled to seek annulment of the marriage on grounds of their having been deceived. For example: if a man purports to be a university graduate when he is not, or claims to be a practising Muslim when he is not, such claims have a bearing on his acceptability as a marriage partner, and his deceived spouse is entitled to withdraw her consent to marry him.

Vis-à-vis commerce and trade

We have discussed the liability for any deficiencies regarding commerce and trade under principle 9 (Liability for damage).

CHAPTER 18

Actions undertaken with good intent do not incur liability

In the Arabic language this is called 'The Principle of *Iḥsān*' – of doing good. While people are held liable for any damage they cause, consequential damage that results from legitimate efforts to save others – for example, the lives of those caught in a fire – do not incur liability.

Similarly, if conditions become so extreme that the lives of passengers and crew are endangered – and the ship's captain is obliged to order items of surplus weight to be jettisoned – he is not liable for losses that result from that 'good action' he is obliged to order out of necessity.

The basis of this principle

From the Qur'ān

> Those who undertake good actions do not incur blame.
> **Qur'ān 9:91**

The above *āyah* was revealed to the Prophet ﷺ when, en route to the battle of Tabūk, some who accompanied him reported that they had no equipment with which to participate in military action. When they learned that he ﷺ had nothing to provide them with they are reported to have departed in tears. The first part of the above *āyah* reads, 'There is no blame on the weak, the sick, or those without funds, if such descriptions accurately reflect their condition.'

Further, all *fuqaha* agree that the *āyat* that deal with specific cases also

operate as general rulings. Thus, exemption from blame or liability, at times of good faith and good intention, is not restricted to *jihād* alone but applicable as a general ruling.

The phraseology of the above *āyah*, 'Those who undertake good actions', applies to a wide range of activities and covers those who seek to benefit or protect others financially, physically or morally. Negation of blame includes exemption from liability for damages, in addition to exemption from accountability on 'The Last Day'.

Common usage

It is reasonable and just to 'return a favour' and to treat those who have acted in 'good faith' with similar appreciation and 'good faith'. For example, those who are stirred to save the property of others from fire, pillage or flood – by lodging them in safe and secure premises – are not held liable for any subsequent damage to that property. It would be wholly unreasonable to seek compensation from those who have sincerely attempted to save your property.

To discuss liability for damage we need to distinguish between honesty, trustworthiness and circumspection on the one hand, and dishonesty, intention to cheat, and lack of care on the other. If one leaves an envelope or box of jewellery in the care of another – who takes all precautionary measures to protect those effects – they are not held liable for any loss or damage that inadvertently occurs while those effects remain in their possession. However, if they neglect to take the same reasonable precautions as they do for their own property, they are held liable for any compensation that might be claimed.

Even in circumstances in which an item left in the care of another is moved by them to a safer location – despite the owner's objections to this being done – liability is not incurred for any consequential damage on the basis of the *āyah*, 'Those who undertake good actions do not incur blame.'

Consensus

All jurists accept this principle and do not hold liable for consequential damages those who have acted with good intent. For example, refer to Shaykh Muḥammad Ḥasan al-Najafi in *Jawahir al-Kalām*, Vol. 27, p.147.

Points for debate

Even though the rulings on this subject are clear, we need to explore examples that include areas for debate, for example:

- Valuables are left in the care of a person who safeguarded them with the same level of security as he did his own valuables. When he travelled he did so in the firm belief that he had taken every reasonable precaution to safeguard the items left in his trust. However, in his absence a thief gained access to his safe and stole everything lodged therein. In these circumstances he should not, according to this principle, be held liable to compensate the owner. However, it might be argued that the items left in trust would have been better protected if they had been temporarily deposited in a facility that maintains regular security checks.

  It is important to clarify that the points of liability to be discussed only concern the two parties involved and that, for this purpose, matters concerning insurance policy conditions are not relevant.

- It is the considered opinion of an 'investment manager' that – in the light of impending improvements to market conditions – a client's capital should be immediately invested. Unfortunately for this 'investment manager', the market unexpectedly moves in the opposite direction and a loss is suffered. In their deliberations, Islāmic jurists make distinction between financial investors and 'guardians' appointed to oversee a minor's funds. For the latter they presume guardians will make every effort to safeguard and advance a minor's interests. However, in financial investment issues juridical judgements are based upon the terms and conditions agreed by the parties to the contract.

- Assume that two routes to a destination are available, one longer but considered safe, the other shorter but considered more risky. If a transport company, in the light of reliable current information and with the best of possible commercial motives, decides to take the shorter, riskier route, is he to be held liable for consequential loss?

CHAPTER 19

Nursling nurture establishes ties equivalent to blood relationships

The 4,000 species of mammal all produce milk to meet the specific nutrient needs of their offspring, and thus human breast milk is the ideal sustenance for human infants.

Well-documented advantages of breastfeeding include health, nutritional, immunological, developmental, psychological, social, economic and environmental benefits. For example, breast milk is said to help to lower the risk of, or to protect against: diabetes, gastroenteritis, diarrhoea, asthma, allergies, urinary tract infections, chest infections and wheezing, ear infections, obesity and attention-deficit hyperactivity disorder. Furthermore, mothers produce antibodies to whatever disease is present in their environment and their milk is thus adapted to fight the diseases their babies are exposed to.

Benefits for the infant

Milk fed directly from the breast is immediately available at body temperature. Sucking at the breast exercises and strengthens the jaws and encourages the growth of straight, healthy teeth. In addition, it creates early attachment between mother and child. At birth, infants see only 12 to 15 inches (30 to 40 cm), the distance between a nursing baby and its mother's face.

Benefits for the mother

Breastfeeding releases hormones that relax mothers and cause them to experience nurturing feelings towards their infants. Breastfeeding, as soon as possible after birth, increases the levels of hormones that stimulate

contraction of the womb and trigger the secretion of milk. Breastfeeding may also help a mother return to her previous weight as fat accumulated during pregnancy is utilized in her production of milk. Frequent and exclusive breastfeeding delays return of menstruation and fertility, allows iron stores to be maintained and retains the possibility of natural child spacing. Breastfeeding mothers experience improved bone remineralization after the birth and a reduced risk for both ovarian and breast cancer – both before and after the menopause.

Bonding

Maternal bonds are strengthened by breastfeeding's hormonal releases that reinforce feelings of nurture. The strengthening of maternal bonds is important as studies show that up to 80% of mothers suffer from some form of postpartum depression.

When looking after a child while the mother is away for short periods, an alternative carer may feed the child with the mother's expressed breast milk (EBM). However, mothers who are unable to breastfeed may draw upon the assistance of a wet-nurse. The biography of the Prophet Muḥammad ﷺ records that a lady by the name of Ḥaleema Saʿdiah nursed him and, in the absence of his mother, was his foster mother. All schools of Islāmic law agree that the nurture of nurslings establishes ties equivalent to blood relationships. That is, any two children who suckle from the breast of the same woman are considered by *sharīʿah* to be siblings. A man may not marry his blood sister, or a 'sister' who has been suckled from the same breast that fed him.

The basis for this principle

From the Qur'ān

> Mothers shall suckle thir children for two full years . . . and the father must maintain them in the manner appropriate to their way of life.
> **Qur'ān 2:233**

> It is prohibited to marry your mothers, daughters, sisters, paternal or maternal aunts, nieces, 'wet-nurses' who have suckled you, or 'sisters' that result from having been breast-fed with you.
> **Qur'ān 4:23**

Conditions

1. The Imāmiyah deem it necessary for the wet-nurse's lactation to have been brought about via lawful sexual relations. If this is not the case, none of the above-mentioned relationships apply. Divorce, or the death of a wet-nurse's husband after legal conception has taken place, does not impact on this ruling.

   The Ḥanafi, Shāfi'i and Māliki schools opine that there is no difference between a woman being married or unmarried, as long as she has milk with which to feed the child.

   According to Ḥanbali *fiqh*, the legal results of suckling do not follow unless the milk is the result of a pregnancy – but they set no condition for pregnancy being the result of legal intercourse.

2. The Imāmiyah deem it necessary for the child to suckle directly from the breast – if the milk is taken via indirect means such as a bottle the above relationships are not established. The other four schools consider it sufficient for milk to reach a child's stomach regardless of how it is taken. For Ḥanbalis, it is sufficient for milk to reach the child's stomach even if it needs to be fed via the nose.

3. For the above relationships to apply, the minimum period of suckling – for the Imāmiyah – is either 24 hours or fifteen consecutive feeds with no other source of nourishment being given. Indeed, the *ḥadīth* that is reported from the Prophet ﷺ via the error-free Imāms ﷺ and companions that relates to this point reads, 'What makes the flesh grow and strengthens the bones'. This clarifies the principle that nurture by nursing establishes relationships. For example:

   Kulayni reports via an authentic chain of narrators that the nurture by nursing that establishes relationships is that which develops flesh and strengthens bones.
   Wasa'il al Shī'ah Vol. 20, p.382

   The Shāfi'i and the Ḥanbalis consider five breastfeeds to be the minimum necessary to establish relationships. Apparently they rely upon what 'Amra reported from 'Ayesha, who said, 'Among

> the *āyat* revealed in the Qur'ān was "Ten complete sessions of suckling establishes relationships". The *āyah* was then altered downwards to "Five complete sessions of suckling", and when the Prophet died five sessions of suckling continued to be recited as part of the Qur'ān.'
>
> **Ṣaḥiḥ Muslim Vol.4, p.167**

(However, as no such *āyah* exists in the Qur'ān, the above narration only serves to illustrate the view of some companions vis-à-vis alterations being made to the Qur'ān – an issue that is completely rejected by all knowledgeable Muslims.)

> The Ḥanafis and Mālikis opine that, irrespective of the quantity of milk imbibed, all breastfeeding results in the establishment of relationships, even if only a drop of milk is fed.
>
> **Al-Fiqh ʿala al-madhahib al-arbaʿh**

4. The Imāmiyah, Shāfiʿi, Māliki and Ḥanbali schools all mention the period of breastfeeding to be up to age two. This is based on Qur'ān 2:233 – however, the Ḥanafis extend that period by six further months.

5. According to the Ḥanafi, Māliki and Ḥanbali schools, it is not necessary for a wet-nurse to be alive at the time of feeding. Thus, even if she dies and the child manages to attach to her nipple and suckle, that is sufficient to establish such relationships. Mālikis have gone even further and claim that even if doubt exists if, at the time of suckling, it was milk or any other liquid that was sucked, the relationship is established.

   Al-Fiqh ʿala al-madhahib al-arbaʿh

The Imāmiyah and Shāfiʿi state that in order for such a relationship to be established a woman must be alive when the baby suckles.

Conclusion

When all the above conditions are met relationships are established, the wet-nurse's husband is regarded as her suckling child's foster father, his mother its grandmother, and so on throughout their family.

CHAPTER 20

Reliance on the 'Muslim market'

The 'principle of validity' (see chapter 3) outlined the basis upon which communities rely on the reports, conduct and transactions of practising Muslims, with regard to religious requirements of 'purity', 'permissibility' and 'acceptability' having been met.

The principle of reliance on the Muslim market examines the standing that 'Muslim markets' have in regard to Islāmic legal requirements being met, their acceptance by the community and the consequential assumptions made vis-à-vis the market's trade and business dealings.

Should the clientele of a Muslim market assume that all meats on sale are from animals slaughtered in accordance with *sharī'ah*? That all leather goods displayed are from *ḥalāl* slaughtered beasts? That all beverages offered are free of impurities? That all the goods available have been lawfully acquired and are legally authorized to be sold?

The answer to such questions is that all business conducted within a Muslim market is considered to be 'in line' with *sharī'ah*.

Imagine how onerous life would be if every Muslim customer had to check every tradesperson – butcher, baker, restaurateur, café owner, etc. As Imām Ṣādiq ﷺ expressed it, 'If you do not rely on this principle no transaction would ever be possible or valid' (See Al-Kāfi Vol. 7, p.387).

The basis of this principle

From āḥadīth

1. Shaykh Ṭūsi narrates that when Al-Ḥalabi consulted Imām Ṣādiq ﷺ on the suitability of slippers sold in the market he ﷺ

said, 'You may wear them while you offer prayer unless you are certain that the pair you bought was made from a non-*ḥalāl* slaughtered beast.'

Tahzeeb al-Aḥkam Vol. 2, p.234

Wasa'il al Shī'ah Vol. 3, p. 490

2. Shaykh Ṭūsi also narrates that when Aḥmad ibn Muḥammad ibn Abi Naṣr asked Imām Ṣādiq ﷺ if a fur garment – bought in the market without knowing if the creature had been slaughtered according to *sharī'ah* – could be worn during prayer, the Imām ﷺ told him that there was no need to investigate the matter because Islām does not cause anything to be a hardship.

   Wasa'il al Shī'ah Vol. 3, p. 491

The sole reason why no investigations are made about a creature's slaughter is because, being reliant upon the Muslim market, we need to presume that its conduct is undertaken in the appropriate manner.

3. Shaykh Ṭūsi also narrates that when Aḥmad ibn Muḥammad ibn Abi Naṣr asked Imām Riḍa ﷺ if leather slippers – bought in the market without knowing if the creature had been slaughtered according to *sharī'ah* – were suitable for use during prayer, the Imām ﷺ replied, 'I buy my slippers from the market, sometimes specially made for me, which I use during prayer without carrying out any investigations.'

   Wasa'il al Shī'ah Vol. 3, p. 492

Common practice

Examination of the manner in which the Prophet ﷺ and error-free Imāms ﷺ availed themselves of the services of the Muslim market reveals that they did not investigate the claims its tradespeople made – indeed, no record exists of them having done so. That the common practice of righteous Muslims was accepted by Allāh's Messenger ﷺ indicates that we too must accept that the Muslim market works within the rules laid down by *sharī'ah* – unless there is clear evidence to the contrary.

This principle is clearly the counterpart to the already discussed principle of validity.

Ambiguous circumstances

It is unconsciously assumed by consumers within Muslim majority countries that franchised outlets of global brands manifest Muslim market characteristics – reliance upon which is the general rule. It follows that they believe the products sold by them to be *ḥalāl*. However, as entrepreneurial eyes, focused upon the generation and accumulation of wealth, are not necessarily concerned with the requirements of *sharīʿah*, the anomalous existence of international outlets in Muslim majority lands results in ambiguity. Such ambiguous circumstances are an exception to the above rule and need clarification.

CHAPTER 21

Invalid terms and conditions of contract

Parties to contracts may include whatever terms and conditions they manage to get the other party to agree to. However, instances could hypothetically exist in which the terms and conditions included in a contract are meaningless – for example, a motor rental contract that precludes the vehicle from ever being driven, or a marriage contract that precludes conjugal rights. Clauses that contradict the purpose of a contract are not considered to have effect and are thus ignored by jurists.

Terms and conditions prohibited in Islāmic law

1. Rental of premises subject to their being used to purvey intoxicants.
2. The making of monetary loans subject to payments of interest.
3. The employment of attractive women specifically to beguile and lure custom.
4. The sale of arms or equipment designed to attack the innocent.
5. The sale of grapes subject to their being used in wine production.
6. The sale of premises, subject to the purchaser agreeing to continue to run casinos from them.

According to *sharī'ah*, such conditions are prohibited on the grounds that they constitute an encouragement to major sins. Some jurists discuss the possibility of this type of contract being valid with their terms and conditions

being ignored. However, others are of the opinion that the inclusion of any of the above conditions renders contracts invalid.

The basis of this principle

From the Qur'ān

1. O you who believe, fulfil the contracts you make.
   Qur'ān 5:1

2. Remain true to your word for you are accountable.
   Qur'ān 17:34

From āḥadīth

1. The Prophet ﷺ said, 'Believers must abide by conditions that they have agreed to.'
   Tahzeeb al-Aḥkām Vol. 7, p.37
   Al-Istibṣār Vol. 3, p.232

2. The Prophet ﷺ said, 'Those who believe in Allāh and the here-after must fulfil their promises.'
   Al-Kāfi Vol. 2, p.270

Prerequisites for validity of the terms and conditions of contracts

We need to be familiar with what constitutes a valid condition. In some references on Islāmic jurisprudence five prerequisites are needed for terms and conditions to be considered valid:

1. ***To be within the abilities of the contracting parties.*** Although this seems obvious, most jurists cite it as a prerequisite. The common example they give for a condition that is not within the ability of anyone to meet is the sale of dates – ready for consumption – at a time when such dates have only recently appeared on the palm trees. To mature, dates require suitable conditions and time to develop and ripen. It is not within the ability of any vendor to command dates to ripen instantly. Another example is the sale of a motor car that is claimed not to require any type of fuel – clearly not within the realms of possibility. Yet another example is a

stipulation that the purchaser paint a painting, regardless of their having or not having artistic ability to do so.

2. ***Not to contradict anything that has been set by the Qur'ān and Sunnah.*** This is the most important prerequisite for all who claim to submit to Islāmic law. See the examples above prohibited by the Qur'ān and Sunnah – that are not permissible to include as conditions to a contract.

   'Abdullah ibn Sinān reports, with an authentic chain of narrators, that Imām Ṣādiq ﷺ said, 'Muslims have to honour their commitments – unless the terms and conditions of a contract contradict the Holy Qur'ān.

   A similar narration states that Imām Ṣādiq ﷺ said, 'It is not permissible to include conditions to a contract that oppose the Holy Qur'ān.
   Wasa'il al Shī'ah Vol. 18, p. 16

   When an Islāmically unacceptable condition was included in a contract, the Prophet ﷺ declared, 'Any term or condition that does not exist in the Book of Allāh is invalid. What Allāh ordains is supreme and binding upon those who believe.'
   Sunan al-Bayhaqi Vol. 4, p.338

As the Sunnah supports and details Qur'ānic principles, conditions that contradict it are not acceptable.

3. ***To be reasonable.***

4. ***Not to negate the purpose of the contract itself.*** Conditions that negate the purpose of a contract are void and meaningless. Examples include: a vehicle rental contract that precludes the car from being driven, or a marriage contract that precludes conjugal rights (cited above). Those of sound mind who include such terms and conditions can have no genuine interest in the contract itself. Serious and sincere intentions are necessary prerequisites for contracts to be established.

5. ***To be clear and specific.*** Ambiguity in the terms and conditions of a contract is not acceptable. A phrase such as, 'I will rent my house to you on condition that you do me a favour', without clearly specifying what is meant by the word 'favour', renders a contract invalid due to that ambiguity. If the currency to be used in a contract is not specified,

confusion may result from that lack of transparency. Every detail within a contract needs to be clearly stated and understood. Bids for construction contracts require bills of works and specifications that detail precisely the materials, work and time span of the contract. Ambiguity in such details leads to future disputes.

CHAPTER 22

Custom circumscribes religious rulings

Legal duties may arise in a variety of contexts but are most generally established by custom, statute (drawn up by a legislative body), or constitutional law. Whatever its source, a legal duty must be owed to the plaintiff by the named defendant in order for a civil suit to be viable.

Common law is nothing other than the common customs that have obtained force of law by being established via the implied consent and practice of illiterate people as unwritten justice – in Latin, *jus non scriptum*. It has not been instituted by Charter or Parliament – acts reduced to writing and record – but exists in use and practice, unrecorded and unregistered other than in the memory of the people.

A custom begins and grows to perfection when a reasonable act is found to be good, beneficial and agreeable to the nature and disposition of the people. They then use and practise it again and again until, by frequent repetition continued without interruption, it is a custom that has obtained the force of law. In the view of some people, such customary laws are peerless, for written laws made by the edicts of princes, or councils of estates, are imposed upon subjects whether or not they are fit, agreeable or convenient to the nature and disposition of the people. By contrast, custom never becomes a law to bind people until it has been tried, tested, approved and found not to be inconvenient, for if it had been so it would no longer have been used and would have lost the virtue and force of law. Thus, common law reflects custom and precedent. Statute and deliberate design play no, or at best a minimal, role in establishing the unformulated web of rules that govern the way people deal with each other.

As in certain customary law cultures influential people or groups do have the power to change the norms of customary law, there is no significant distinction between customary law and statutory law. Even though there is no reason for one to be subordinate to the other, there is hardly anywhere in the world where a central power respects and upholds indigenous or minority religious customary laws. Those who argue that there cannot be two legal systems within one state cite the hierarchical source of law and claim that customary laws could only be applied if they do not conflict with the statutory law of the state. Despite this, it is feasible to introduce an order – through legislation or otherwise – to respect two legal systems if the political will to do so exists.

If customary laws are not inferior to those of other legal systems, and if it is possible for legislators and courts to grant them equal value to that of other legal systems, it is not customary law that is viewed as inferior, but the culture of those from which it springs. Colonizers have historically regarded indigenous peoples and minority cultures as racially and culturally inferior. Despite such views being scientifically false, substantial parts of the legal order created under colonialism remain in the books of law and – consciously or subconsciously – in the minds of those who apply the law.

The Prophet Muḥammad ﷺ encouraged his followers to forsake pre-revelatory Arab customs and traditions that related to adoption, usury and looting, but did not abolish their other customs and traditions. To explore the validity of Arab customs and traditions that still influence the lives of the Muslim population we need to define the word *'urf* – custom.

'Urf is defined as 'recurrent practices within society that are accepted by those of sound mind'. For any custom or tradition to have a valid basis in legal decisions it must have the support of sound and reasonable people within society. Practices that promote prejudice or corruption have no value and are not considered.

The basis of this principle

From the Qur'ān

It needs to be noted that the word *'urf*, used in Qur'ān 7:199, refers to sound and laudable behaviour and does not, in that context, convey the same sense as it does when it is employed as a technical term by jurisprudents.

The word *ʿurf*, as used in Qur'ān 7:199, derives from a similar word from the same root, *maʿruf* – as in the phrase *amr bil maʿrūf* – to enjoin good behaviour. If society encouraged honourable behaviour and discouraged the doing of iniquitous deeds, only moral values would be evident in society. The Qur'ān refers to such recurrent practice as *ʿurf*.

Sharīʿah attempted to amend and regulate Arab customs and bring them into line with the principles of the *sharīʿah*. An example of this is the ruling concerning the liability – *āqilah* – of an offender's kinsmen to pay blood-money – *diyah*. In cases of manslaughter, all male relatives of an indicted person are jointly liable to indemnify the victim's family for bodily injury suffered.

Conditions for valid *ʿurf*

For *ʿurf* to be valid, it has to be reasonable and accepted by those of sound mind, in addition to the following:

1. ***A custom cannot violate any definitive – qatʿi – principle of Islāmic law.*** For example, in some communities females are disinherited at their father's death, a practice within Bedouin society prior to the advent of Islām. However, as this custom is in contradiction to the rules of inheritance revealed in the Qur'ān, it holds no validity in Islāmic law.

   Nowadays, no one expects interest-free bank or building society loans to be made, despite parties to such contemporary financial instruments being of sound mind. Nonetheless, the levy and payment of interest is not acceptable in Islāmic law and the Holy Qur'ān considers that such transactions 'wage war against Allāh and His Messenger'. In order for the economy to function, *sharīʿah* promotes profit-sharing – *muḍārabah* – a more equitable method to conduct such transactions.

2. ***Custom cannot contravene any clearly stipulated terms or conditions of a contract.*** While it is customary for the cost of formal registration of a property to be borne by the purchaser, should both parties agree that the vendor will cover that expenditure, or that the purchaser and vendor share it equally, the terms and conditions of the agreement overrule such custom.

In many traditions a bride's dowry is paid in two instalments – the first being paid immediately and the second one being deferred. In Iraq it is the custom for the deferred part of dowries to fall due after 12 or 14 years. Most wives do not claim deferred dowry payments unless they become involved in divorce proceedings. However, if a bride should stipulate that her dowry is to be paid in full on her wedding day, her demand would overrule the customary practice of society.

3. ***Custom needs to be approved by the majority of a society.*** Traditional behaviour that is restricted to a select group has no effect on society at large. An example of this concerns items that are to be included in the sale of a property or motor car. Nowadays, properties for sale list fixtures and fittings to be included in the sale. In the absence of such a list, how does one determine which items are to be included? One suggestion might be to defer to what is customarily understood by estate agents. However, *sharī'ah* does not accept that the customs and opinions of specific trades or professions are valid as rulings for those who do not work in those trades or professions.

Oral and practical customs

To define the meaning of a particular term we need to refer to the customs of the society or specific groups that employ it. For example, the understanding of the term 'basic foodstuff' may differ depending on what the staple diet of a community is. In one it may be rice, but in others it might be bread, pasta or potatoes. Similarly, different communities may understand the word 'transport' to apply to a small boat, a donkey cart, a camel, a bicycle, a bus or an executive jet.

Do we understand words used in the Qur'ān and Sunnah according to the context in which they are used in the Qur'ān, or do we need to look up their meaning in a dictionary or lexicon? All disciplines employ their own terminologies by which their texts are understood.

When someone is charged a price over the market rate, if the overcharge is marginal they have no legal claim for refund but, if it is considered to be far beyond what is regarded as normal, they become entitled to a refund. Understanding of what is considered to be a marginal or an extreme overcharge rests with the practical customs of the society in which the parties live.

Another example concerns the maintenance of bonds with womb relatives. We know that severance of such relations is considered in Islāmic law to constitute a major sin. But for guidance on how to define what is meant by 'the maintenance of bonds', we need to refer to the customs of various societies. In English society, picking up the telephone to say 'hello' is widely considered to fulfil this duty; on the other hand Middle Easterners expect relatives to visit them at home and stay for a 'decent' length of time. In some communities it is important to take a bunch of flowers when visiting; in others a box of chocolates is considered to be more appropriate.

Before a custom can be approved, it must be ascertained if it was practised in the presence of the Holy Prophet ﷺ or error-free Imāms عليهم السلام. If these made no objections, it is considered to have received their indirect approval. The Arabic language refers to this as *Al-Sirah al-Muttaşilah bi zaman al maʿşūmin*.

CHAPTER 23

Summary knowledge is as binding as detailed knowledge

To introduce this subject we will examine the following:

1. If we are certain that a drop of blood or wine has dripped into a tumbler of water we are clear that both tumbler and water have been rendered impure.

2. However, if there are two tumblers of water and we are certain that a drop of blood or wine has dripped into one of them, how should we respond with regard to purity and impurity?

Our knowledge in case (1) above is detailed – *tafṣīli* – whilst our knowledge concerning case (2) is only summary – *ijmāli*. The difference is that in (1) there is no confusion or ambiguity regarding what is known, whilst in case (2) clarity and ambiguity are balanced. Clarity is represented by the certainty that there is a drop of blood or wine in one tumbler while ambiguity is represented by lack of knowledge as to which tumbler of water has been contaminated.

There are infinite examples of summary knowledge. For example, the teacher of a class may know that pupils have thrown a chair out of the window, but be uncertain as to which pupil did so. It may be clear that a neighbour's vehicle has bumped one's parked car but one may have no clear information as to which neighbour is responsble.

In chapter 7 'Certainty is not challenged by doubt', which dealt with 'detailed' knowledge, it was made clear that doubt is ignored when certainty is arrived at. That is because certainty has the value of 100%, while the value

of doubt, by definition can never exceed 50%. When certainty is achieved, *sharīʿah* determines that one is accountable to act upon it. If, for whatever reason, one does not act upon certainty, one is in violation of Allāh's laws.

In order to answer the question of 'how to respond' to summary knowledge, we need to differentiate between what is obligatory and what is prohibited. When someone is torn between two actions because he/she knows that one is obligatory but is not sure which, he/she must fulfil both to ensure security. For example, if a traveller is unsure whether he/she meets the requirements for shortening the prayer, it is incumbent upon her/him to offer the full as well as the shortened prayer. Or, if one entertains doubts that the Friday prayer offered by a particular congregation meets the essential requirements of such prayer, it is incumbent upon one to offer both the *Ẓuhr* and the *Jumʿah* prayer.

If someone has summary knowledge that one of two possible actions is prohibited, they must avoid them both. For example, if I know that either *x* or *z* was nursed by my mother and thus one is my sister by suckling, I am not permitted to marry either of them.

There are often more than two alternatives; for example, if of ten sheep slaughtered on a particular day one did not meet *sharīʿah* slaughter requirements, it is obligatory to avoid eating any of them.

So what are the consequences of acting upon one option of summary knowledge? For example, concerning the above example of two tumblers of water, a person might make the assumption that one of the tumblers has not been contaminated and drink from it. This situation is unsafe because he/she might have consumed contaminated liquid, referred to as 'probable non-conformity' – *mukhālafah iḥtimāliyah*. However, drinking both tumblers of water would constitute 'definitive non-conformity' – *mukhālafah qaṭʿiyah* – a situation that represents outright disobedience to Allāh.

Dissolution of summary knowledge

In the above example of women who may have been suckled by the same nurse – if several reliable witnesses confirm that it was clearly not *x* who was suckled by the same nurse as oneself, the ambiguity is displaced by clarity. Certainty may also be brought about via one's senses – in the example of the polluted tumbler of water, if it is possible to detect the smell of wine in one tumbler clarity may be achieved. The technical term for such clarification is

referred to in jurisprudence as 'dissolution of summary knowledge' – *inḥilāl al-ʿilm al-ijmāli*. Similarly, in the example of the slaughtered sheep above, if clarity is obtained that a specific sheep was not slaughtered in conformity with *sharīʿah*, the remaining nine become permissible to consume.

In the study of Principles of Jurisprudence, there are various cases to be examined under the title 'dissolution of summary knowledge'; the few examples given above provide clear indication of this subject.

CHAPTER 24

Persistent doubts are to be ignored

Errors clearly need to be put right. A plumber or electrician who makes a mistake is expected to ensure that their fault is remedied, and the same applies to acts of worship. However, if doubts persist about the same issue, jurists recommend they be ignored. The basis of their ruling rests mainly upon *aḥadīth* related by the error–free Imāms ﷺ.

The basis of this principle

From aḥadīth

1. Zurarah and Abu Baṣīr report that they asked Imām Ṣādiq ﷺ about a person who prayed without concentration and was thus not aware of the number of *rakʿāt* they had offered. The Imām's answer was that such prayer needed to be repeated. When asked, what if that person continues to retain persistent doubt every time he repeats the prayer? he ﷺ said, 'such repeated doubting needs to be ignored because it represents the attempt of Shaytān to ruin prayer. Once he is ignored he will not return'.
   Wasa'il al Shīʿah Vol. 8, p.228

2. Muḥammad ibn Muslim narrates from Imām Baqir ﷺ that those who are persistently inattentive must ignore that fault and continue with their prayers.
   Wasa'il al Shīʿah Vol. 8, p.228

3. Shaykh Ṭūsi reports via a reliable chain of narrators from Imām Ṣādiq ﷺ concerning a person who entertains persistent doubts during prayer as to whether he had gone into *sajdah*, *rukū'* or not. He ﷺ said, 'He must ignore his doubts and only if he is absolutely certain that he has missed something should he correct his prayer.'
Wasa'il al Shī'ah Vol. 8, p.229

4. Muḥammad ibn Abi Ḥamzah narrates from Imām Ṣādiq ﷺ that those who doubt one in three of their actions are to be considered 'persistent doubters'.
Wasa'il al Shī'ah Vol. 8, p.229

Who is a persistent doubter?

On many occasions we cannot find a definition for a particular term in the *aḥadīth*. The only way in which to determine precisely what it means is to refer to *'urf* – custom. Persistent doubting is a psychological phenomenon known as obsessive compulsive disorder (OCD). However, *ḥadīth* number 4 above characterizes such people as those who entertain doubts three times in one action. People with this psychological disorder need not wait for doubt to occur three times in one action and should ignore them entirely as and when they occur.

When a normal person has doubts during prayer

The general rule from the error-free Imāms ﷺ for doubts as to the number of *rak'āt* offered during a prayer is to assume that the greater number has been offered and to then offer an additional precautionary *rak'ah* after the prayer has been completed.

The doubts of a normal person may be relieved in the following manner:

- If after the recital of the second prostration a person entertains doubt as to whether he has performed two or three *rak'āt*, he should assume that he has indeed performed three and complete his prayer accordingly. After finishing he should then rise and perform one precautionary *rak'ah* – just in case he had only performed two.
- If after the recital of the second prostration a person entertains doubts as to whether he has performed two or four *rak'āt* he should assume that he has indeed performed four *rak'āt* and complete his prayer accordingly.

After completion, he should then rise and perform two precautionary *rakʿāt* – just in case he had only performed two.

- If after the recital of the second prostration a person entertains doubt as to whether he has performed two, three or four *rakʿāt* he should assume that he has indeed performed four *rakʿāt*. After finishing the prayer he should then rise and perform two precautionary *rakʿāt* plus two *rakʿāt* in the sitting posture. It is the opinion of all Imāmiyah jurists that two *rakʿāt* performed in the sitting position equate to one in the normal standing position.

- If after the recital of the second prostration a person entertains doubt as to whether he has performed four or five *rakʿāt*, he should assume that he has indeed performed four *rakʿāt* and complete his prayer accordingly. After finishing the prayer he should perform two prostrations for inattentiveness – *sajdat al-sahw*.

- If at any stage of the prayer, a person entertains doubts as to whether he has performed two or four *rakʿāt* he should assume that he has indeed performed four *rakʿāt* and complete his prayer accordingly. After finishing the prayer he should rise and perform two precautionary *rakʿāt* plus two *rakʿāt* in the sitting posture.

- If while standing, a person entertains doubts as to whether this is his fourth or fifth *rakʿah*, he must sit down and recite *tashahud* and the *salām* of the prayer. After the prayer has been finished he should perform either one *rakʿah* of precautionary prayer in the normal way or two *rakʿāt* in the sitting position.

- If while standing, a person entertains doubts as to whether this is his third or fifth *rakʿah*, he must sit down and recite *tashahud* and the *salām* of the prayer. After the prayer has been finished he should perform two *rakʿāt* of precautionary prayer in the normal way.

- If while standing, a person entertains doubts as to whether this is his third, fourth or fifth *rakʿah*, he must sit down and recite *tashahud* and the *salām* of the prayer. After the prayer has been finished he should perform two *rakʿāt* of precautionary prayer in the normal way plus two *rakʿāt* in the sitting posture.

Doubts that render a prayer void

When two possibilities of doubt are meaningless in terms of the number of *rakʿāt* completed, it is clear that no basis exists for the prayer to be recognized as valid. For example, one has to pray four *rakʿāt* for *Ẓuhr* and whilst doing so to entertain doubts as to whether one has completed three or six *rakʿāt*. Both possibilities are meaningless because neither three nor six *rakʿāt* are valid for the *Ẓuhr* prayer. At least one of the possibilities has to be credible – if both are not, the prayer cannot be valid.

In all the situations below the offering of the prayer is considered to be void. The prayer thus still needs to be offered in its entirety.

- Doubts about the number of *rakʿāt* offered in *ṣalat al-Fajr* or *Maghrib*.
- Doubts as to whether two or five *rakʿāt* have been completed during the *Ẓuhr*, *Asr* or *Isha* prayers.
- Doubts as to whether three or six *rakʿāt* have been completed during the *Ẓuhr*, *ʿAsr* or *ʿIsha* prayers
- Doubts as to whether four or six *rakʿāt* have been completed during the *Ẓuhr*, *ʿAsr* or *ʿIsha* prayers.

CHAPTER 25

All liquids that cause intoxication are considered impure

The verb 'intoxicate' is borrowed from the Latin word for poisoned – *intoxicatus* – from the noun for poison – *toxicum*. Its meaning of drunkenness is borrowed from the Medieval Latin for poisoning – *intoxicationem* – derived from *intoxicare* 'to poison'. The word 'drunk' implies that someone is at present the worse for drink – to have lost control over behaviour, movement or speech as the result of having been poisoned by alcohol.

In its figurative sense, the word 'intoxication' derives from an earlier adjectival sense of being stupefied or exhilarated. Thus, in its metaphoric sense, 'drunk' may describe the state of irrationality that results from intense fear or excitement, or the euphoria that is stimulated by poetry, music or success.

In the Qur'ān the word 'drunkenness' is used in both its literal and its metaphorical sense.

In its literal sense:

> O you who believe, do not enter your prayer whilst in a state of drunkenness.
>
> **Qur'ān 4:43**

In its metaphorical sense – while describing the Day of Resurrection:

> You will see the people as drunk despite their not being intoxicated – for Allāh's punishment is awesome.
>
> **Qur'ān 22:2**

The metaphorical sense of the word is also found in the *aḥadīth*

1. Intoxication may be the result of three things: being drunk on wine, being drunk on riches or being drunk with power.
   Biḥār al-Anwār Vol. 10, p.114

2. Beware of being intoxicated by your sins because that is far worse than being intoxicated by wine. Have you not read that Allāh Almighty said, 'Deaf, dumb and blind, they will not return' (Qur'ān 2:18).
   Biḥār al-Anwār Vol. 77, p.102

3. The return to sobriety after the intoxication of heedlessness or conceit is far more of a problem than the return to sobriety after being drunk on wine.
   Ghorar al-Ḥikam

With regard to 'impurity', most Islāmic jurists acknowledge the difference between liquids and solids. Liquid intoxicants are considered impure, while solids, such as opium, cannabis, etc., whilst being *ḥarām*, are considered to be pure.

Gradual introduction to the prohibition of intoxicants

After their acceptance of Islām, many Arabs continued to drink wine and question the Prophet ﷺ about it until the following *āyah* was revealed:

> They ask you [O Prophet] about wine and gambling. Say, in them is a great sin as well as an advantage for people, but the sin surpasses all the advantages.
> **Qur'ān 2:219**

It is clear from the above *āyah* that in the early years of Muḥammad's prophethood, drinking wine was not completely prohibited despite the evil of drinking being signalled. Later Divine Revelation to some extent forbade the use of wine by telling Muslims not to pray while intoxicated: 'O you who believe, do not pray while you are drunk, wait until you are sober and are aware of what you recite' (Qur'ān 4:43).

At the last stage, prohibition was made absolute:

> O you who believe, wine, gambling, idols and the use of arrows to divine the future are all abominations of Satan – avoid them so that you may prosper. Satan seeks to cast enmity and hatred among you by means of wine and gambling and to keep you from the Remembrance of Allāh and prayer. Will you not then desist?
>
> **Qur'ān 5:90–91**

The basis for this principle

From the Qur'ān

> O you who believe, wine, gambling, idols and the use of arrows to divine the future are all abominations of Satan – so avoid them.
>
> **Qur'ān 5:90**

In this *āyah*, the drinking of wine is described as an abomination. In customary understanding – *'urf* – this equates to it being impure. Although some jurists have questioned the clarity that this *āyah* contributes to the Islāmic legal definition of impurity, its interpretation is made clear in the following *aḥadīth*.

From aḥadīth

Two groups of *aḥadīth* may be cited. The first communicates that wine and beer are prohibited, and the second that they are impure.

Examples regarding prohibition

- Kulayni narrates on the authority of Imām Baqir ﷺ that the Prophet ﷺ said, 'All intoxicants are prohibited and all are to be treated in the same manner as wine.'
  Wasa'il al-Shī'ah Vol. 25, p.326
- In a letter to the Abbasid Caliph Al-Ma'mun, Imām Riḍa ﷺ wrote, 'Even the tiniest droplet of a liquid that may cause intoxication is prohibited.'
  Wasa'il al-Shī'ah Vol. 25, p.330
- Imām Baqir ﷺ said, 'The prayers of those who have consumed wine or other intoxicating beverages are not accepted for 40 days.'
  Wasa'il al-Shī'ah Vol. 25, p.330

- Kulayni narrates that when Al-Washa wrote to Imām Riḍa ﷺ for a ruling regarding beer, his reply clearly stated that beer is *ḥarām*.
  Wasa'il al-Shī'ah Vol. 25, p.360

Examples regarding impurity

- Kulayni records that when 'Abdullah ibn Sinan asked Imām Ṣādiq ﷺ if he needed to launder a garment he had lent to a person who drank wine, he was told not to wear it for prayer until that had been done.
  Wasa'il al-Shī'ah Vol. 3, p.468

- Kulayni records that Imām Ṣādiq ﷺ said, 'When clothes are polluted by wine or other intoxicants the polluted areas need to be washed; if the full extent of the pollution is unclear, the whole garment needs to be laundered. Any prayers offered in polluted clothes need to be repeated.'
  Wasa'il al-Shī'ah Vol. 3, p.469

- Shaykh Ṭūsi records that Imām Ṣādiq ﷺ said, 'Do not offer prayer in places where wine is served because the Angels avoid them – and do not offer prayer in clothes polluted by wine or other intoxicants until they have been cleaned.'
  Wasa'il al-Shī'ah Vol. 3, p.470

- Shaykh Ṭūsi records that when Imām Ṣādiq ﷺ was asked what should be done if a droplet of wine or other intoxicating liquid fell into a dish of meat in sauce or gravy, he was told that the meat should be washed before being eaten but that the sauce or gravy was no longer suitable for Muslim consumption.
  Wasa'il al-Shī'ah Vol. 3, p.470

- Kulayni records that when Imām Ṣādiq ﷺ was asked about beer, his response was that it should not be drunk as it falls into the same category as wine and for that reason, clothes contaminated by beer need to be cleaned.
  Wasa'il al-Shī'ah Vol. 25, p.361

Alcohol

In English, the word 'alcohol' is commonly used to describe any intoxicant even though, chemically, several types of alcohol do exist, e.g.

Methanol	CH_3OH
Ethanol	CH_3CH_2OH
1-propanol	$CH_3CH_2\ CH_2OH$
1-butanol	$CH_3(CH_2)2CH_2OH$
1-hexanol	$CH_3(CH_2)4CH_2OH$ and
1-octanol	$CH_3(CH_2)6CH_2OH$

Although all alcohols are toxic when ingested, human beings are able to tolerate low levels of ethanol – which is the reason why the alcohol ethanol is used as the basis for all alcoholic beverages.

Ethanol	CH_3CH_2OH
Synonyms	Ethyl alcohol, grain alcohol
Properties	
Toxicity	Can be ingested at low levels
Other	Colourless, odourless, liquid

Uses In the manufacture of alcoholic beverages – the 'alcohol' in alcoholic drinks.

To dissolve organic compounds insoluble in water – for example in the production of perfumes and cosmetics.

As an industrial feedstock.

As a fuel – ethanol can be used as a fuel in its own right, or in mixture with petrol (gasoline). 'Gasohol' is a petrol/ethanol mixture that contains 10–20% ethanol.

Note Industrial methylated spirits (meths) is ethanol, with a small addition of methanol and colour. It is because methanol is toxic that industrial methylated spirits are unfit to drink.

Thus, all Islāmic religious reference to 'alcohol' refers to ethanol – and not to the alcohols that are too toxic to be drunk. It follows that, as these are not in

the same category as wine and other intoxicating beverages, they are not considered by Islāmic jurists as being impure. It should be noted that Islāmic jurists are in agreement that small percentages of alcohol found in fresh apple juice and bananas, citrus-flavoured boiled sweets made from citric essences preserved in alcoholic solvents and the alcoholic additives used in the manufacture of cough syrup and cosmetic products such as aftershave and eau de cologne are all legally considered to be pure.

Liquor

The word 'liquor' is derived from the Latin word *liquor* – liquid. Prior to 1300 CE it had the sense of being any drink, especially wine. Today it refers primarily to distilled alcoholic drinks such as whisky, rum, brandy, gin, etc., also referred to as spirits or 'hard liquor'. However, the word liquor may also refer to the reduced liquid or juice from the cooking of food or, when prefaced by the noun of a specific substance, e.g. chocolate, refer to the liquid or paste (liquor) that is produced when cocoa beans are roasted and ground. However, 'chocolate liquor' is not to be confused with 'chocolate liqueur', for the word 'liqueur' is a French word, itself from the Latin *liquor*. Liqueurs are sweet alcoholic beverages flavoured by herbs, spices, flowers, roots, bark, chocolate or cream being dissolved in the alcohol.

Spirit vinegar / wine vinegar

When the chemical formulation of the elements oxygen and hydrogen – which as H_2O constitute water – are no longer bonded together as H_2O, they cease to constitute water and are transformed back into the gases hydrogen and oxygen. As changes to chemical structures transform their properties – referred to in Islāmic jurisprudence (*fiqh*) as *istiḥālah* – such transformations are acknowledged by jurists to be 'purifying agents'. Once the structure of wine or spirits is transformed into vinegar, all jurists accept it as pure. Even supermarkets understand that vinegars have no place in alcoholic drink displays.

Alcohol used in cooking

It might be assumed that alcohols added to food before or during cooking would be dissipated. However, the table below shows that this is not the case. The results of a US Department of Agriculture 'Nutrient Data

Laboratory' study show the percentages of alcohol retained after a variety of methods of cooking:

Preparation method	Percentage of alcohol retained
Alcohol added to boiling liquid & removed from heat	85
Alcohol flamed	75
No heat, stored overnight	70
Baked for 25 minutes, alcohol not stirred into mixture	45
Baked/simmered, alcohol stirred into mixture:	
15 minutes	40
30 minutes	35
1 hour	25
1.5 hours	20
2 hours	10
2.5 hours	5

The above table is included on the following URLs:

http://chefshane.com/alcohol_burn_off.php

http://www.diabetic-lifestyle.com/articles/febo4_cooki_1.htm

http://homecooking.about.com/library/archive/blalcohol12.htm

www.ochef.com/165.htm

http://www.ucook.com/news2.cfm?item_no=2074

http://whatscookingamerica.net/Q A/AlcoholCooking.htm

CHAPTER 26

Inability to fulfil a religious duty does not absolve one from obligation

Some examples of this principle are:

- We know that the body of a deceased person requires to be washed three times. The first washing is with liquid from Lote leaves soaked in water, the second with diluted camphor water, and the third with pure water. If Lote leaves or camphor are not available, the three washes clearly must be done with pure water. In other words, the absence of Lote leaves or camphor does not absolve one from the need to wash a body three times.
- Some *sharī'ah* penalties stipulate that a slave must be freed. The fact that this is no longer an available option does not absolve one from fulfilment of this penalty via a substitute penalty of equivalent worth. A jurist will specify a comparable sum to be spent upon the poor and needy.
- Some *sharī'ah* penalties to expiate sin stipulate fasts of 60 days' duration – with a minimum of 31 such days being consecutive. If for reasons of health this is not possible, the fast has to be performed in whatever manner is considered to be possible.

The meaning of this principle

It is apparent from the above that when *sharī'ah* requirements comprise several aspects, some of which cannot be met, people are not absolved from the obligation to fulfil the aspects that can be met.

The basis of this principle

From the Qur'ān

Some jurists attempt to endorse this principle through the following *āyah*:

> It is a duty to Allāh, for those who can afford it, to make Pilgrimage to the House.
>
> **Qur'ān 3:97**

We know that pilgrimage consists of various acts including the stay in ʿArafat from noon till sunset on the ninth of *Dhul Ḥijjah*, the stay at Muzdalifah, the sacrificial offering, and the 'stoning' of the *Jamarāt* in Mina. If, for whatever reason, it is not possible to stone the *Jamarāt* no one may conclude that their whole pilgrimage is ruined – because Muslims are only obliged to correctly fulfil as many aspects of pilgrimage as they are able. This principle also applies to those who cannot circumambulate the Kaʿbah on foot and need to use a wheelchair or to be carried.

From aḥadīth

- The Prophet ﷺ said in his *ḥajj* speech, 'O people, Allāh has made pilgrimage incumbent upon you – so fulfil it.' When a person asked if it was to be repeated every year he ﷺ remained silent. Only when the question had been repeated for the third time did he ﷺ say, 'Had I answered "yes", it would have become incumbent upon you even if you were not able to fulfil it.' He then said that the interminable questioning of prophets had placed onerous obligations upon previous nations.

  > He ﷺ continued, 'When I instruct you to do something, fulfil as much as you are able, and when I forbid you to do something, refrain from it.'
  >
  > **Ṣaḥiḥ Muslim Vol. 2, p.975 Tradition 1337**
  >
  > **Sunan al-Nisa'ī Vol. 5, p.110**

It is apparent from the above that the Prophet ﷺ took into consideration the limitations and abilities of the Muslim community to fulfil their religious obligations and duties. He clearly intended to establish that, in circumstances in which they were unable to complete a duty, they still needed to strive to fulfil those parts of it that they could.

- Imām ʿAlī ﷺ said, 'That which you are unable to fulfil does not absolve you from the fulfilment of the whole obligation.'
  Al-Qawaʿid al-Fiqhiyah Vol. 4, p.136

- Imām ʿAlī ﷺ said, 'Even if you know you will not be able to complete something, do whatever part of it that you are able to.'
  Al-Qawaʿid al-Fiqhiyah Vol. 4, p.136

In accordance with this *ḥadīth*, even if one lacks the means to cover the complete cost of medical treatment for someone who is desperately ill, one should nevertheless contribute as much as one can. Similarly, if a person is not able to stand for the whole prayer, he/she should stand for the part they are able to stand for, and sit for the rest.

Although this principle applies to obligatory acts, it can be extended to voluntary acts. For example, if one is not able to perform all of the 11 *rakʿāt* of the midnight prayer, one should still complete as many as one is able to.

CHAPTER 27

Dissimulation and its manifestations

Dissimulation, from the Latin *dissimulatus* – concealed or disguised – is the English word to describe behaviour that is intended to cloak a person's true feelings or thoughts from others. The Arabic for this – *taqiyah* – is derived from the word *waqa* – to protect. It must be noted that those Muslims who vehemently oppose everything that differs from their own understanding of Islām are eager to disparage the Prophet's progeny, *Ahl al-Bayt* ﷺ. They thus wilfully misinterpret this concept in order to accuse the followers of *Ahl al-Bayt* ﷺ of concealment of the truth and of being dishonest in the expression of their beliefs.

This chapter sets out to clarify the concept, starting with the Islāmic law definition of dissimulation, 'Concealing creed or commitment from those likely to cause you great damage.'

To provide a simple example, the various schools of Islāmic law – *mathāhib* – have differing views regarding some details of prayer; for example, Shīʿah Muslims, those who follow the *Jaʿfari mathhab*, are required to place their foreheads on the earth during prostration – an action not required by the other *mathāhib*. In circumstances in which a Shīʿah Muslim joins a Sunni congregation and fears being attacked by 'anti-Shīʿah' Muslims who see him place his forehead on a sun-dried clay tablet, should he/she invite attention by doing so, or seek 'protection' by acting in the same manner as the other members of the congregation?

There are two different aspects of this issue:

1. Permissibility to dissimulate under Islāmic law.
2. Whether actions of dissimulation are valid, or need to be compensated for.

Permissibility to dissimulate

From the Qur'ān

> Believers ought not to ally themselves with disbelievers and thus separate themselves from their fellow believers. Those who do so will be disregarded by Allāh – other than in circumstances in which they are fearful of being harmed . . .
>
> **Qur'ān 3:28**

> Those who renounce Allāh after having affirmed their faith in Him – other than those who have been coerced to contradict their heartfelt faith – will feel the wrath of Allāh . . .
>
> **Qur'ān 16:106**

The above *āyah* was revealed to the Prophet Muḥammad ﷺ when Makkan infidels tortured ʿAmmar ibn Yaser in order to force him to utter what they construed to be a recantation of his Islāmic belief. History evidences that ʿAmmar's faith was firm and that he did not forsake it. However, when he went to the Prophet ﷺ, ashamed of what he had been forced to articulate, the Prophet ﷺ not only consoled and reassured him that his faith had not been sullied, but counselled him to behave in a similar manner should he again find himself in similar circumstances.

Both the above *āyat* indicate that in times of danger it is permissible to conceal information, or even to deny one's faith. This is not a matter of hypocrisy or playing games with religion, but one of survival and of giving priority to the most important issue over other issues of lesser importance.

From aḥadīth

- Kulayni narrates from Imām Ṣādiq ﷺ that his father used to say, 'Nothing is more pleasing to my eye than *taqiyah*. *Taqiyah* is a shield for believers.'
- Kulayni narrates from Imām Ṣādiq ﷺ that, '*Taqiyah* is a shield for believers. *Taqiyah* is a caution for believers. Those who do not observe *taqiyah* do not have faith.'
- Imām Ṣādiq ﷺ said, '*Taqiyah* constitutes nine-tenths of religion.'

- Imām Ṣādiq ﷺ said that his father used to say, 'By Allāh, there is nothing on earth more pleasing to me than *taqiyah*. Those who observe *taqiyah* will be elevated by Allāh, and those who reject it will be rejected by Allāh.' **Wasa'il al-Shī'ah Vol. 16, pp.204–205**

Discussion

From the above *āyat* and *aḥadīth* it is patent to Islāmic jurisprudents that, in circumstances in which life may be threatened, *sharī'ah* clearly condones dissimulation. However, Shaykh Murtaḍa al-Anṣāri drew attention to situations in which dissimulation can be either obligatory or prohibited. The example he cites for dissimulation being obligatory is self-defence. He points out that common sense dictates that in the defence of life, every means available must be employed – even those that are in normal circumstances considered to be criminal. The example he provides for dissimulation being prohibited is, if you are told you will be killed if you do not kill another. In such a situation *sharī'ah* forbids people from taking action that they hope may save their own lives, for they have no basis or authority upon which to make a judgement on the relative value of lives.

In circumstances in which dissimulation is neither obligatory nor prohibited, the legal ruling that supports permissibility remains in force.

Are dissimulated acts valid?

It is clear that the rulings that concern dissimulation are circumstantial and not absolute. In times when the unjust behaviour of dictatorial rulers leads to the maiming, torture or death of those whom they suspect might disagree with them, dissimulation seems to be the only solution. However, if we compare this to situations in which individuals are able to exercise their religious duties in an arguably freer atmosphere, one may conclude that there is no place for dissimulation.

So, do acts of worship performed with *taqiyah* have to be compensated for once safety is attained? Or, put in other words, can a normally unacceptable act of worship – undertaken due to threatening circumstances – be a valid replacement of an essential act?

The extraordinary rulings of the Prophet ﷺ or an error-free Imām ﷺ – instituted to meet specific circumstances – are as binding as normal

> and more general rulings. In the specific circumstances for which they were decreed, they are as incumbent as general rulings are in normal circumstances. Thus, those who exercise *taqiyah* in threatened circumstances are deemed to have fulfilled their obligations and do not need to do anything further. When, on the last day of Ramaḍan, the governor of Ḥīrah once asked Imām Ṣādiq's opinion about the need to fast on that day he ﷺ responded that it was entirely at the discretion of the leader of the community – 'if he fasts the population fasts, if he does not, they do not'. The governor promptly ordered food to be served and Imām Ṣādiq ﷺ related that, 'I ate with him in spite of my knowing that it was the last day of Ramaḍan – for to break one day's fast and make up for it later is better than to be killed and in addition, being guilty of violating a Divine Rule [to observe *taqiyah*].'
>
> **Wasa'il al-Shī'ah Vol. 10, p.132**

This *ḥadīth* indicates the permissibility to exercise *taqiyah*, but that doing so does not relieve one from making up for a particular day's fast that one is in no doubt is required.

However, when authorities in Ḥijaz declare that a particular day is the ninth of Dhul Ḥijjah, it is incumbent on all pilgrims to regard that day as being the true day for the stay in ʿArafat – even though they might be certain that it is the eighth of Dhul Ḥijjah. This rule may be supported by a *ḥadīth* narrated by Abul Jarūd who once asked Imām Baqir ﷺ about confusion over *ʿĪd al-Aḍḥā* and was told, 'One must observe what the majority observe regarding fasting and pilgrimage.' The only objection to this *ḥadīth* is that Abul Jarūd is not considered to be a reliable narrator and that we may not base any deductions upon a weak *ḥadīth*.

Consideration of the above *ḥadīth* – in the context of *taqiyah* – clarifies that it is more important in the eye of 'The Legislator' that the Muslim nation be united in celebration of a single day such as *ʿĪd al-Aḍḥā* – than for individuals to adhere to their own calculations.

> However, there is a specific issue that can be a matter of debate between jurisprudents, namely for followers of *Ahl al-Bayt* to join the congregational prayer of *Ahl al-Sunnah*. In an authentic chain of narrators Shaykh Ṣaduq narrates that Imām Ṣādiq ﷺ said, 'Those

> who join the congregations of *Ahl al-Sunnah* are like those who pray behind the Holy Messenger of Allāh in the first row.'
>
> **Wasa'il al-Shī'ah Vol. 8, p.299**

Some jurists understand the above *ḥadīth* within the context of *taqiyah* – when people fear that they will face great danger if they exhibit any difference from the majority. However, there are others who understand it to express the essential need for the Muslim nation to display solidarity, harmony and unity and to avoid disputes and rifts.

CHAPTER 28

The execution of a will has precedence over the distribution of assets

Despite it being highly recommended that Muslims fulfil their charitable obligations during their own lifetime, philanthropic donations are frequently left to heirs to discharge.

Islāmic law specifies that the assets of the deceased should be used for the following:

1. For the execution of the will
2. For the discharge of outstanding debts
3. For heirs to receive the residue in accordance with the rules of inheritance.

In line with Islāmic law, heirs automatically inherit prescribed shares of a deceased person's assets. Notwithstanding this, everyone has the option to bequeath whatever property they wish to specific individuals or organizations.

This chapter examines the precedence that categories (1) and (2) have over category (3), differentiation between various types of last will and testament, prerequisites for a will to be valid, and the limitation for only a third of the assets being utilized for charitable purposes.

It is highly recommended to leave a will

Many Muslims do not consider the importance of leaving clear instructions regarding the disposal of their assets. Thus, when they depart this life their heirs are often confused as to what they might have wished. The worst situations occur when one heir asserts, without the availability of clear supporting evidence, that certain property was promised to her/him. In such circumstances it is not uncommon for acute family divisions to result. To avoid dissension Allāh has ordered:

> It is prescribed that when death approaches one of you who has wealth to leave behind, that it be bequeathed in good manner to parents and near relatives. This is a duty upon those who are pious.
> **Qur'ān 2:180**

There are many *aḥadīth* from the Prophet ﷺ and error-free Imāms ﷺ to support this injunction:

- Muḥammad ibn Muslim narrates that Imām Baqir ﷺ said, 'To leave a will is a duty. The Prophet ﷺ did so and it follows that it is incumbent upon all Muslims to do so too.'
- The Prophet ﷺ said, 'Whoever dies without leaving a will is to be regarded as being from a pre-Islāmic community.'
- The Prophet ﷺ said, 'No Muslim should retire at night without a will under their pillow.'
  Wasa'il al-Shī'ah Vol. 19, p.258

Technical terms

In the Arabic language the Islāmic law term for 'last will and testament' is *waṣiyyah*. This is defined by jurists to be an endowment of property to be effected after death. In Arabic, the person whose will it is, the testator, is the *mūṣi*. The one to whom something is left, the legatee, is the *mūṣa lahu*, and the legacy itself is the *mūṣa bihi*. The executor, or person whose duty it is to execute the will, is the *waṣiy*.

Islāmic law ascribes two aspects to a will:

1. Gifting – by which the beneficiary/legatee is bequeathed property – *waṣiyyah tamlikiyah*.

2. Administration – by which an executor is charged to handle the administration of the will without being a beneficiary – *waṣiyyah ʿahdiyah*. This, of course, does not preclude payments being made for such services.

Waṣiyyah tamlikiyah

It is clear from the above that four aspects need to be discussed:

1. The will itself
2. The testator
3. The legatee
4. The legacy

1. The will itself

There is a discussion between jurists as to whether a will is a contract between two parties that in common with all contracts requires offer and acceptance, or if it is an initiative established by one party without need for formal acceptance by the named executor.

In light of the similarities between wills – *waṣiyyah tamlikiyah* – and 'deeds of gift' – *ʿaqd al-hibah* – we support the first opinion. The only difference between the two is that in the former, property transference occurs after the death of the donor while in the latter, the transference occurs during the donor's lifetime.

Having asserted that *waṣiyyah tamlikiyah* is a contract, it requires, as with all other contracts, both offer and an acceptance. The reason why some jurists thought that it was not a contracted arrangement is that the legatee does not pay anything in exchange for the bequest. Notwithstanding that, there is no necessity for a contracted arrangement to include an exchange of property; for example, one may offer one's professional services free of charge. Furthermore, the only occurrence under Islāmic and possibly all other legal systems – in which transference of property is automatic and without need of contractual acceptance – is 'inheritance'. In other words it is an exception to the general rule.

No terms that transgress Islāmic law are valid

An essential requirement for validity of a will is that its terms be acceptable under Islāmic law. It is therefore not permissible for a will to include terms such as:

> The legacy is to be used to establish centres that promote 'sinful' activity.
>
> The legacy is to be used to publish materials to mislead others.
>
> The legacy is to be used to support political agendas that are likely to result in societal discord.

As seen in chapter 16, 'Not to cooperate in the perpetration of sinful actions', Islāmic law does not sanction Muslim participation in sinful acts.

Can one cancel or amend one's last will and testament?

People may, of course, at any time – verbally, in writing, or by their actions – change, amend, alter or revoke a previously drawn-up will. For verbal revocation or alteration, two reliable witnesses are required. For written revocation or alteration, a declaration needs to be made to the effect that the will being currently drawn up is one's 'last will and testament', and it must be clearly dated to evidence that it has been effected subsequent to all previous wills. An example of an action that revokes a will is the sale of property specified in the will. *Aḥadīth* from the error-free Imāms ﷺ record that:

- Imām ʿAlī ﷺ said, 'The living may vary or cancel the terms of their Wills.'
- Imām ʿAlī ibn al-Ḥusayn ﷺ said, 'One may bequeath a gift or change one's mind about it at any time prior to death.'
- Imām Ṣādiq ﷺ said, 'A testator may revoke her/his Will at any time.'
  Wasa'il al-Shīʿah Vol. 19, p.303

2. The testator

For a will to be valid a testator must be adult, mature, of sound mind and not subjected to duress – the prerequisites for all valid transactions. The only exception to this rule concerns the acceptability of a teenage testator's will. Although commencement of responsibility and accountability, with regard

to 'acts of worship', is commonly considered by jurists to begin when boys complete their fifteenth year and girls enter their tenth year, there are *aḥadīth* that refer to boys of ten being entitled to make their own wills.

- Muḥammad ibn Muslim reports that Imām Ṣādiq ﷺ said, 'If a teenager writes a Will but dies prior to attaining majority, the only terms that have legal validity are those that concern relatives.'

  While this *ḥadīth* does not specify the age of testators who have not attained majority, it restricts the validity of their wills to relatives.

- Abu Baṣir reports that Imām Ṣādiq ﷺ said, 'When a boy is ten years old he may bequeath one-third of his assets to charitable causes.'

- ʿAbdul Raḥman ibn Abi ʿAbdullah reports that Imām Ṣādiq ﷺ said, 'A ten-year-old boy's will is legally binding.'

- Zurarah reports that Imām Ṣādiq ﷺ said, 'A boy of ten years old is entitled to make charitable donations and reasonable bequests.'

  Wasa'il al-Shīʿah Vol. 19, pp.361–362

Based upon the above *aḥadīth*, the majority of Shīʿah jurists concur that by ten years old, boys are able to make reasonable charitable donations and bequests. (Al-Ghunyah, *Tathkirat al-Fuqaha* and *Sharaye' al-Islām*). While the Māliki and Ḥanbali schools of law share this view, the Ḥanafi and Shāfiʿi schools do not (*Al-Fiqh al-Islāmi wa Adillatuhu* Vol. 8, p.26).

3. The legatee

Can a beneficial heir also be specified as a legatee?

> The four schools of *Ahl al-Sunnah* all concur that an heir may not inherit specified assets of an estate over and above their prescribed share. They base such decision on a *ḥadīth* in which Abu Amamah reported that the Prophet ﷺ said, 'Allāh has given every heir what they deserve, so no heir is entitled to receive anything further from the deceased's estate.'
>
> **Al-Ṣiḥaḥ al-Sittah other than Nisa'i.**

> These schools also cite another *ḥadīth* in which the Prophet ﷺ is reported to have said, 'No heir may be an additional legatee unless all the other heirs approve.'
>
> **Nail al-Awṭār Vol. 6, p.40**

In contrast, Imāmiyah and Zaydiyah jurists acknowledge that heirs are entitled to receive, in addition to their prescribed share of an estate, any property that has been specifically bequeathed to them in a will – without the need for any approval. They base this upon the *āyah* with which we opened our discussion:

> It is prescribed that when death approaches one of you who has wealth to leave behind, that it is bequeathed in good manner to parents and near relatives. This is a duty upon those who are pious.
>
> **Qur'ān 2:180**

As it is clear that no *ḥadīth* may contradict an explicit ruling of the Qur'ān, it does not require a great exertion to refute the previous *aḥadīth*. This ruling has been emphasized by more than ten reports related by the error-free Imāms ﷺ.

> In his attempt to endorse the opinions of the four schools of *Ahl al-Sunnah*, Dr Zuhaili writes, 'Giving preference to a particular heir over the others would lead to disputes and enmity and stimulate jealousy and hatred between blood relatives. That is why the Prophet ﷺ made the approval of all the heirs a condition for one of their number receiving specified property in the Will.'
>
> **Al-Fiqh al-Islāmi wa Adillatuhu Vol. 8, p.41**

It is interesting to note that in the Qur'ān Allāh Almighty awards male heirs twice the share of female heirs without regard to consideration of enmity or strife being established between heirs.

Can a non-Muslim be a legatee?

This category encompasses three groups: (1) Non-Muslims who are under the protection of the Islāmic state (*Dhimi*) – who are blood relatives, (2) Non-Muslims who are under the protection of the Islāmic state (*Dhimi*) – who are not blood relatives, (3) Non-Muslims who are at war with the Muslim state (*Ḥarbi*).

Whilst jurists from the different schools of thought all agree that people in group (3) are not entitled to inherit or receive property bequeathed to them by any Muslim, they differ regarding groups (1) and (2). One can justify their agreement regarding group (3) in the light of the probability that such bequests could be spent to promote hostilities towards Islām and Muslims.

Al-Muḥaqiq al-Ḥilli (in *Sharaye' al-Islām,* Vol. 2, p.253) believes that only group (1) have a right to property that has been bequeathed to them. His ruling is based upon the following Qur'ānic *āyah*:

> Allāh does not forbid you from being kind or from behaving justly towards those who are not fighting with you over your religion, nor driving you from your lands, for truly Allāh loves those who are just.
> **Qur'ān 60:8**

However, 'Allamah Ḥilli (in *Qawā'id al-Aḥkām,* Vol. 1, p.293) and Al-Muḥaqiq al-Karaki (in *Jāmi' al-Maqāsid,* Vol. 10, p.51) believe that both groups (1) and (2) are entitled to receive bequests. They base this on a report that Imām Ṣādiq ﷺ said, 'If a person appoints me to be the executor of a will, in which he has made a specific bequest to a Jew or Christian, I would comply with his wishes because Allāh tells us in the Qur'ān, 'Sin rests with anyone who alters [a will] after hearing it.' (Qur'ān 2:181)
> **Al-Kāfi Vol. 7, p.15**

Furthermore, in Qur'ān 60:8 Allāh makes no reference to any restrictions that require a legatee to be a relative for a will to be valid – a powerful argument in support of 'Allamah Ḥilli's opinion.

Can a Muslim bequeath her/his assets to pet animals?

In *Qawā'id al-Aḥkām*, 'Allamah Ḥilli states, 'If a person bequeaths something to an animal, that article of their will is to be considered invalid because for bequests – *waṣiyyah tamlikiyah* – both offer and acceptance are required and it is not possible for acceptance to be received from an animal. Of course, it is perfectly acceptable to leave provision for the care of one's animals.' This opinion is supported by Al-Muḥaqiq al-Karaki in (*Jāmi' al-Maqāsid,* Vol. 10, p.49), and by Ḥanafi, Shāfi'i and Māliki jurists (see *Al-Fiqh al-Islāmi wa Adillatuhu* Vol. 8, p.35).

Is it necessary for a legatee to exist at the time a will is drawn up?
While one is clearly not able to bequeath anything to those who have already passed from this world, it is perfectly natural to wish to bequeath something for one's family's future offspring. The only point of debate regarding this issue is if such action is to be considered within the category of wills – *waṣiyyah* – by which ownership is transferred, or within the category of endowments – *waqf* – that concern beneficial interests rather than ownership.

4. The legacy or bequest

The legacy must meet the following requirements:

a. It must exist as property not simply as a right to something.

   A right to revive barren land does not constitute property and thus cannot be bequeathed.

b. It must have a lawful usage.

   Musical instruments, gambling equipment and wineries are not considered suitable as bequests.

c. It is not to exceed one-third of the total assets, unless the heirs willingly approve of such bequests.

This is based upon *aḥadīth* from the Holy Prophet ﷺ and error-free Imāms ﷺ; see for example *Wasa'il al-Shī'ah*, Vol. 19 pp. 271–281.

Waṣiyyah 'ahdiyah

The above issues have all concerned the transference of ownership of bequeathed property. We now examine the issues concerned with the execution of a will – *waṣiyyah 'ahdiyah*. This concerns the administrative duties to effect a will – appointment of guardians for minors and the safeguards needed to ensure that the articles of a will are fulfilled in strict accord with the wishes of the testator, etc.

Sanity and maturity are two prerequisites for executors. Jurists differ regarding a third prerequisite, namely 'being a righteous and trustworthy person'. To most jurists it is clear that executors need to be both trust-

worthy and righteous. However, there are others who consider it the prerogative of the testator to choose whomever they wish to deal with their affairs after their demise.

However, if an executor is deemed not to be up to the task, the jurist in charge of people's affairs will appoint an assistant to discharge the responsibilities.

CHAPTER 29

Speculative analogies are not valid bases

Three methodologies may be applied in analytical studies and scientific research:

1. Inference from one particular to another – when two subjects are similar and a judgement about one is known, that judgement may be inferred to the other subject on the basis of it being similar. The technical term for this in Islāmic law is analogy – *qiyās*.

2. Inference from the particular to the universal is called induction – *istiqrā'*. In order to arrive at a rule that is truly 'universal' scientists have to examine an extremely wide number of incidents and repeat experiments before being able to claim that 'universality' really does exist.

3. Inference from the universal to the particular is referred to as deduction, or a syllogism – *burhān*. This is a formal deductive argument made up of a major premise or *kubrā*, a minor premise or *ṣughrā*, and a conclusion or *natijah*. An example of such inference within Aristotelian logic is, 'All birds have feathers, penguins are birds, therefore penguins have feathers.'

In comparisons between the above three methodologies we observe: for analogy or *qiyās* to be a reliable tool in the derivation of Islāmic legal rulings, the Imāmiyah emphasize the need for it to be definitive and *not* speculative. However, other schools of Islāmic law, the Ḥanafiyah in particular, make no differentiation between that which is definitive and that which is speculative. As for induction – *istiqrā'* – it goes without saying that explo-

ration of as many particulars as possible is required before one is able to provide a definitive universal judgement. With regard to deduction/ syllogism or *burhān*, it is agreed by all scholars that in the absence of the article 'all' in the major premise, such reasoning is false. For example, if it were to be said that 'Birds sing beautifully, penguins are birds, therefore penguins sing beautifully', the reasoning used for such judgement can clearly be seen to be false because it has not been asserted that 'all' birds sing beautifully.

Speculative reasoning does not provide valid methodology

In referring to the Holy Qur'ān we find that, 'Most of them [those who disbelieve] follow nothing other than conjecture; truly conjecture is not able to provide the truth' (Qur'ān 10:36). In another *āyah*, Allāh condemns those who suggest measures for both the lawful and the unlawful based only upon their own understandings, saying, 'Has Allāh permitted you, or do you forge a lie against Allāh?' (Qur'ān 10:59). It is clear from the above that speculative conclusions that are not based upon definitive statements do not provide a valid methodology for the derivation of Islāmic rulings.

Judgements passed in courts have to be based upon definitive investigations. In referring to judges who make mistakes, for which they are to be held accountable on the Day of Judgement, the Prophet ﷺ included those whose verdicts, despite being precise, were not based upon thorough investigations (*Wasa'il al-Shī'ah*, Vol. 27, p.22).

In another *ḥadīth*, the Prophet ﷺ is recorded to have said, 'Those who act without proper knowledge ruin more than they may cure' (*Wasa'il al-Shī'ah*, Vol. 27, p.25).

Based upon the Holy Qur'ān and the above *aḥadīth*, the Imāmiyah reject speculative analogical deduction – *qiyās* – and do not regard it to be a valid methodology in the absence of textual sources.

Essential requirements for *qiyas*

Technically, *qiyās* is the extension of a *sharī'ah* value from an original case – *aṣl* – to a new case on grounds that the latter has the same effective cause as the former. The original case is regulated by a given text and *qiyās* seeks to extend the same textual ruling to the new case (Al-Shawkani, *Irshād al-Fuḥūl*, p.198).

The essential requirements for *qiyās* are:

1. The original case – *aṣl* – on which a ruling has been given in the text and which analogy seeks to extend to a new case.
2. The new case – *farʿ* – on which a ruling is needed.
3. The effective cause – *ʿillah* – that is a characteristic of the *aṣl* to be shared with the subject of the new case.
4. The ruling – *ḥukm* – that has been clearly given for the original case and, by way of *qiyās*, extended to the new case.

A good example for this is that it is clearly prohibited for Muslims to drink wine (this is *aṣl*) and its prohibition is called *ḥukm*. There is no text to tell us about the ruling regarding the taking of narcotics, so by establishing similarities in the effective cause (*ʿillah*) between wine and drugs, those who support *qiyās* extend the ruling for wine to cover narcotics. The only observation of the Imāmiyah regarding this type of derivation is that similarity in the effective cause must be definitive rather than speculative.

But how can one differentiate between the definitive and speculative bases?

1. When the lesser degree of any action is prohibited in a text, it is logically right to say that the greater degree is also prohibited. For example, in Qur'ān 17:23 we read that none is permitted to say to their parents 'I am fed up with you'. It is only rational and logical that insults via the use of stronger words or actions are prohibited too. This is technically referred to as *mafhūm al-Muwāfaqah.*
2. When the wording in the original ruling is used only as an example, e.g. when we read in a *ḥadīth* that, 'You have to wash hands that have been in contact with impurities such as urine,' it follows that this applies to any other parts of the body too – the hands being only the example. This is technically referred to as definitive effective cause – *tanqiḥ al manāṭ al qatʿi.*
3. When the effective cause *ʿillah* is mentioned in the text itself. For example, when we read in a *ḥadīth* that 'Drinking wine is prohibited because it leads to intoxication', the reason for such prohibition is explicitly

mentioned in the text and can thus be applied to any other item that is likely to cause intoxication. This is technically referred to as *manṣuṣ al ʿillah*.

To go back to the example of narcotics, by extending the ruling for wine to encompass them we employ syllogism rather than analogy, explained as follows:

The major premise:	All intoxicants are prohibited
The minor premise:	Narcotics are intoxicants
The result:	Narcotics are prohibited

If we use the above methodology of syllogism or refer to the case as *manṣuṣ al ʿillah* we arrive at the same conclusion.

All jurists concur that the Qur'ān and the Sunnah constitute the sources – *aṣl* – of *qiyās*. However, according to the Ḥanafiyah, *qiyās* may also be founded upon rules that have been established by consensus. For instance, Allāh tells us in Qur'ān 4:6 to monitor minors, and when it is clear that they have attained maturity, to permit them to deal with their own property themselves. This rule indicates that minors need the consent of their guardian to validate the decisions they make concerning their wealth. This is the *aṣl* of some of those who defend the concept of *qiyās* and extend need for the consent of the guardian to female minors' dealings with marriage – on the grounds that they perceive similarities between marriage and transactions (Abu Zahra, *Uṣūl*, p.181).

CHAPTER 30

Changes of circumstance lead to changes in rulings

In Islāmic law, every statement is composed of two elements – subject matter and ruling. The first element may consist of any thing, act, or even omission, and the second element, of one of the five following rulings:

1. Obligatory – *wājib*. When an action is emphatically demanded by Qur'ānic and/or Sunnah reference, it is referred to as being obligatory, e.g. daily prayer, fasting during the month of Ramaḍān, pilgrimage to Makkah for those who can afford it and the payment of *zakāt*, etc.

2. Prohibited – *ḥarām*. When an action is prohibited by Qur'ānic and/or Sunnah reference to inform Muslims that they 'must' refrain from it, it is referred to as being *ḥarām*. This refers to sins that contaminate soul and mind, e.g. theft, bribery, lying, usury, etc.

3. Recommended – *mustaḥab/mandūb*. This refers to actions that are demanded by Qur'ānic and/or Sunnah reference, but have a lesser degree of emphasis. While acting upon them secures the merit that leads to higher levels of righteousness, their omission does not render one accountable. The actions covered include voluntary prayer, helping the poor, caring for orphans, etc.

4. Discouraged/detested – *makrūh*. Actions that are not considered to be sins but that may become obstacles to the soul being elevated, e.g. overeating, being a chatterbox, not being forgiving, or being involved in a trade that dulls the senses to pain and distress.

5. Optional – *mubāḥ*. When either action or omission are considered to have equal value, i.e. when there is no preference of one over the other; for instance, to have either two or three meals a day, to have either two or three dishes on the table, to travel on foot or by car, etc. This type of ruling is also referred to as being lawful or permissible.

The relationship between subject matter and ruling is similar to the relationship between cause and effect, in that a ruling is the product of deliberations related to specific subject matter. Thus, any change in the subject matter will lead to a change in the ruling. For example, although the consumption of wine is not permitted, wine that has been transformed into vinegar is permitted.

Subject matter	*Ruling*
Wine	prohibited
Vinegar	permitted

The above example illustrates that after a subject matter has been materially changed, rulings that formerly applied are also changed; that is, when the item under discussion is no longer wine, the rulings that concern wine are no longer relevant. To provide another example, when minors – who require guardians to act on their behalf – have reached puberty and are entitled to handle their own affairs, rulings that relate to minors no longer have relevance.

Under principle 5 (Islāmic law does not occasion harm) and principle 6 (Islāmic law does not occasion unbearable hardship), we discussed in detail how freedom of choice to act is restricted, when an action is likely to cause harm to others; or when obligatory actions are likely to result in unbearable hardship, they cease to be binding. Muslims know that fasting is obligatory during the month of Ramaḍān; however, for those with renal problems, this ruling does not apply – yet another example of 'change in ruling' when the subject matter is changed.

When Imām Ṣādiq ﷺ was consulted about a person who had, with the intention of causing damage and harm to his neighbour, demolished the party wall between his and his neighbour's property he ﷺ said, 'That person is not at liberty to do that and if he has already done so, he must erect a new

wall in the same place' (*Da'āim al-Islām*, Vol.2, p.504). Although one may argue that one is free to effect whatever changes one likes to one's own property, changes in circumstance inevitably lead to changes in rulings.

A difficult task that faces contemporary jurists is to determine whether changes in cultural and educational circumstances play any role whatever in changing rulings. For example, in the past it was considered that interest on loans was levied to satisfy the greed and avarice of wealthy lenders and, according to many scholars, that was the reason for interest being prohibited. However, in contemporary society, finance for building the infrastructure of a nation is not possible without the involvement of venture capital – no longer associated with the greed and avarice of the wealthy but with the sharing of profit between those who invest the finance and those who employ it. Should jurists provide a legal opinion that such payments of interest are lawful?

In answer to the above question it must be noted that under Islāmic law the sharing of profit between those who invest finance and those who utilize it – referred to as *muḍārabah* – has existed since the time of the Prophet ﷺ and is not to be confused with the borrowing and lending of money.

In chapter 22 (Custom circumscribes religious rulings) we noted that recurrent practices within society, accepted by those of sound mind – *'urf* – may circumscribe religious rulings, provided that they do not violate any definitive principle of Islāmic law.

Glossary

Aḥadīth (pl. of **ḥadīth**) the sayings of the Prophet Muḥammad ﷺ and error-free Imams ﷺ.

Ahl al-Bayt the progeny of the Prophet Muḥammad ﷺ .

Ahl al-Sunnah Sunni Muslims.

ʿAqd al-hibah deeds of gift.

ʿĀqilah paternal male relatives.

Aṣalat al-Ibaḥah Principle of Permissibility.

Aṣl an original case used in *qiyās*.

Āyah (pl. **ayāt**) literally, a sign. In Qur'ānic terminology, a technical division of the Qur'ān, a verse.

ʿAyn al-yaqin see **yaqin**.

Al-Baḥth al-Khārij the most advanced course of jurisprudence in Islāmic theological colleges.

Bāligh mature, legally, of age.

Bayt al-Mal treasury.

Burhān deduction, inference from the universal to the particular.

Dhimi a non-Muslim under the protection of an Islāmic state.

Dhul yad a person who has control (see **yad**).

Diyah blood money. Financial compensation.

Faqih (pl. **fuqahā**) a jurist.

Farʿ new case used in *qiyās*.

Fatwā (pl. **fatāwā**) independent legal opinion/s.

Fiqh jurisprudence.

Gharar risk, lack of information, uncertainty, hazard.

Ghusl bathing of the whole body, also known as the greater ablution.

Ḥadīth (pl. **aḥādīth**) a report of sayings of the Prophet Muhammad ﷺ and error-free Imāms ﷺ.

Ḥajj annual pilgrimage to Makkah and other holy sites which each Muslim must undertake at least once in a lifetime if he or she has the health and wealth to do so.

Ḥalāl lawful and permitted under Islāmic law.

Ḥanafi a follower of Abu Ḥanifah, after whom one of the Schools of Jurisprudence is named.

Ḥanbali a follower of Aḥmad ibn Ḥanbal, after whom one of the Schools of Jurisprudence is named.

Ḥaqq al-yaqin see **yaqin**.

Ḥaraj unbearable hardship.

Ḥarām unlawful and prohibited under Islāmic law.

Ḥarbi at war with the Islāmic state.

Ḥawzah a traditional Islāmic theological college.

Ḥayḍ menstruation.

Ḥukm a statement, verdict.

Ḥusn beauty or goodness, appropriateness.

ʿIddah a celibate period of waiting for divorced or widowed women before remarriage.

Iḥrām the condition of observance and purity required for pilgrimage, also describes the clothing worn by male pilgrims.

Iḥsān (lit. virtue) doing good.

Ijāzah permission granted by an authorizing source.

Ijmaʿ consensus.

Ijmāli summary knowledge (see **inḥilāl**).

Ijtihād the deduction of rulings from their sources, primarily the Qur'ān and *aḥādīth*.

Ijtimāʿ al-amr wal-nahy the combination of command and prohibition.

ʿIllah cause, reason.

ʿIlm al-yaqin see **yaqin.**

Imāmiyah followers of the authentic Qur'ānic teaching of the twelve Imāms of the Prophet's progeny ﷺ.

Inḥilāl al-ʿilm al-ijmāli dissolution of summary knowledge.

Istiḥālah transformation.

Istiḥsān equity. To deem preferable. Preference for one kind of analogy over another.

Istiqrā' induction, inference from the particular to the universal.

Istiṣḥāb presumption of continuity.

Jallālah Animal accustomed to eat impure substances.

Jihād to strive, struggle. To carry a heavy load.

Juhd to strive. Struggle.

Khabar wāḥid solitary report.

Kubrā a major premise in a syllogism (see **ṣughrā, natijah**).

Lā an article that expresses negation.

Lām al-ʿahd reference to a previously mentioned subject.

Lām al-jins reference to universality.

Mafhūm al-muwāfaqah A case of higher degree compared to a text (understood without saying).

Maḥram a person with whom marriage is not lawful, e.g. a brother, sister, mother, father, aunt, uncle, etc.

Makrūh Any act or thing that is discouraged/detested under Islamic law.

Malakūt the celestial realm. Spiritual authority.

Māliki a follower of Mālik ibn Anas after whom one of the Schools of Jurisprudence is named.

Manāsik rituals of pilgrimage.

Mandūb recommended.

Mansus al-ʿillah When the reason for a ruling is clearly mentioned in the text.

Maʿrūf good behaviour.

Mathhab (pl. **mathāhib**) school/s of Islamic law.

Mubāḥ permissible, optional.

Muḍarabah a business contract in which the investor and entrepreneur agree the ratio in which any profits are to be shared. The investor provides the capital and the entrepreneur the expertise, time and effort.

Mufassar unequivical.

Muḥkam perspicuous or lucid.

Mujmal that which is ambivalent.

Mujtahid a jurist.

Mukhālafah iḥtimāliyah probable non–conformity.

Mukhālafah qaṭʿiyah definitive non–conformity.

Muqayyad qualified. Restricted concept.

Mūṣa bihi a legacy.

Mūṣa lahu a legatee.

Mūṣi a testator.

Mustaḥab recommended.

Mutanajis item affected by impurity (transferred via dampness).

Mutashābih that which is equivocal.

Mutawātir a *ḥadīth* with an uninterrupted chain of narrators.

Muṭlaq unrestricted and unconditional concept.

Nafy to negate (a statement).

Nahy to prohibit.

Najasah impurity.

Najis unclean, impure.

Najis al–ʿayn impure in itself.

Naṣṣ an unequivocal/explicit text.

Natijah a conclusion drawn from the premises in a syllogism (see **kubrā, ṣughrā**).

Qā'idat al–Farāgh the principle of completion: no validity for doubt after an action has been completed.

Qaṣd al-Qurbah to draw closer to Allah.

Qat'i definitive.

Qimār gambling.

Qiyās analogy.

Qusāmah those who have sworn an oath in court.

Rak'ah (pl. **rak'āt**) a cycle for standing, bowing and prostrating during prayer.

Ribā (lit. increase) interest on loans, i.e. usury.

Rukn an essential element.

Rukū' to bow before the Lord. A position during prayer.

Ṣa'id soil, earth.

Sajdah (sujud) to prostrate. A position during prayer.

Sajdat al-sahw a prostration made for any mistake during prayer.

Shāfi'i a follower of Muḥammad ibn Idris al-Shāfi'i after whom one of the Schools of Jurisprudence is named.

Shahādatain declaration of the two tenets of faith.

Shakk scepticism or doubt.

Shar'i legal.

Sharī'ah Islamic law.

Shayṭān (pl. **Shayāṭīn**) Satan or devil.

Shī'ah followers of the Islamic teaching of 'Ali ﷺ after the Prophet ﷺ.

Ṣiyam fasting.

Ṣughrā a minor premise in a syllogism (see **kubrā, natijah**).

Ṣulḥ an amicable treaty or agreement.

Sunnah (lit. practice) the Prophet's tradition, sayings and way of life.

Sunni those who follow the caliphs after the Prophet ﷺ.

Sūrah a division of the Qur'ān.

Ta'āruḍ texts that conflict and thus cannot both be true.

Tafṣīlī detailed (knowledge).

Tanqiḥ al-manāṭ al-qat'i verifying the precise reason for a ruling. Definitive effective cause.

Taqiyah dissemination.

Tashahud a declaration of faith.

Tayamum to perform ablution without water.

Tazāḥum Table of Priorities.

Ṭuhr the time between two monthly periods of menstruation.

ʿUrf custom. Practices within society that are generally accepted.

ʿUsr unbearable hardship.

Uṣūl al-Fiqh the Principles of Islamic Law.

Wahm low probability (less than 50%).

wājib obligatory or incumbent.

Wājib muḍayyaq a limited time frame.

Wājib muwassaʿ a flexible time frame.

Waqf charity or endowment.

Waṣiy the executor of a will.

Waṣiyyah last will and testament.

Waṣiyyah ʿahdiyah administration of a will.

Waṣiyyah tamlikiyah gifting under a will.

Waswās obsessive compulsive disorder.

Wuḍūʾ ablution in preparation for prayer.

Yad a hand, a handle, power.

Yad mubṭilah unrightful possession.

Yad muḥiqah rightful possession.

Yaqin certainty, absence of doubt.

ʿAyn al-yaqin certainty itself.

Haqq al-yaqin absolute certainty.

ʿIlm al-yaqin to know with certainty.

Ẓahir that which is manifest.

Zaidi a follower of Zaid ibn ʿAlī ibn Ḥusayn, who believed that he was eligible for the Imāmah rather than his brother Muḥammad al-Baqir ﷺ.

Zakāh / zakāt an Islamic religious annual welfare tax due on specific commodities.

Ẓann high probability of accuracy (51–99%).

Ẓanni that which is speculative.

Ziarat ʿAshūrā Salutation to Imām Ḥusayn on 10th of Muḥarram.

Zina adultery, fornication.

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